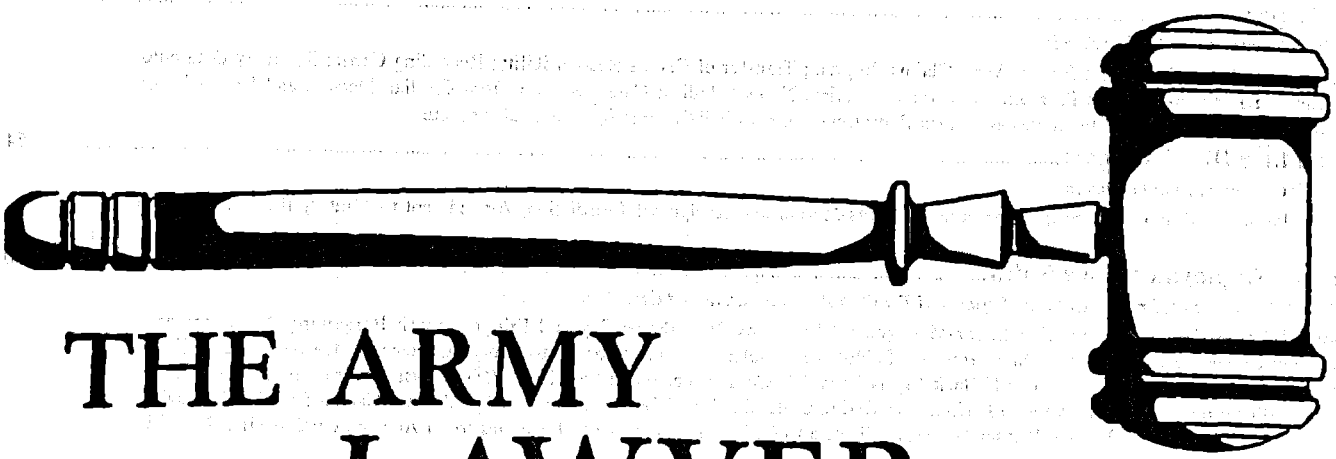

THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-234

May 1992

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The Army Lawyer (ISSN 0364-1287)

Editor
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The Army Lawyer articles are indexed in the *Index to Legal Periodicals, the Current Law Index, the Legal Resources Index,* and the *Index to U.S. Government Periodicals.*

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Issues may be cited as The Army Lawyer, [date], at [page number].

Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903-1781.

Indecent Acts as a Lesser-Included Offense of Rape

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Introduction

In *United States v. King*[1] the Army Court of Military Review considered whether an accused may be convicted of committing indecent acts with another[2] as a lesser-included offense of an alleged rape.[3] The court concluded that, although indecent acts with another potentially is a lesser-included offense of rape, the specification alleging rape in *King* was insufficient to aver a consensual indecent act as a lesser-included offense. The court also found that the specification failed to provide adequate notice to the accused that he would have to defend against the lesser offense of committing a consensual indecent act.

The Facts in *King*

King was charged, *inter alia*, with raping a female soldier, Private *L*.[4] The Government used a "short-form" specification to allege the rape offense.[5]

According to the court of review, the evidence established clearly that King and *L* engaged in consensual group sex.[6] Actually, the accused expressly acknowledged during the trial on the merits that he and *L* had engaged in consensual sexual intercourse. After the accused testified, the Government declared its intention to seek King's conviction under an alternative theory—that he had committed a consensual indecent act with *L*. Accordingly, the trial counsel asked the military judge to instruct the members on the crime of indecent acts with another as an alternative to, or as a lesser-included offense of, the charged rape. The judge complied. Pursuant to his instructions, the court-martial ultimately convicted King of committing indecent acts with another in violation of article 134, finding specifically that King wrongfully engaged in consensual sexual intercourse in the presence of others.[7]

King appealed. The central issue of this appeal, as framed by the Army Court of Military Review, was whether "a summary allegation of rape in a specification is sufficient to meet the test of putting the accused on notice by fair implication that he must be prepared to defend against consensual sex offenses as well as against rape."[8] A substantial body of statutory and decisional law already existed to guide the court in resolving this issue.

Public Fornication as a Lesser-Included Offense

To establish that an accused committed indecent acts with another, as proscribed by article 134, the Government must prove:

> (1) That the accused committed a certain wrongful act with a certain person;[9]

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[1] 29 M.J. 901 (A.C.M.R. 1989).

[2] *See* Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (1988) [hereinafter UCMJ]; *see also* Manual for Courts-Martial, United States, 1984, Part IV, para. 90 [hereinafter MCM, 1984].

[3] *See* UCMJ art. 120; *see also* MCM, 1984, Part IV, para. 45.

[4] *King*, 29 M.J. at 901.

[5] *Id.* at 902. The generic "short-form" rape specification reads as follows: "In that the _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 19___ rape_____." MCM, 1984, Part IV, para. 45*f*(1).

[6] *King*, 29 M.J. at 903.

[7] The specification of which the accused was convicted stated, in part, that the accused "wrongfully committed an indecent act with Private El [*L*] by engaging in group sex with members of lower enlisted grades" in violation of article 134. *Id.* at 901. In the context of the military judge's instructions, the court-martial clearly convicted the accused of engaging in *consensual* sexual intercourse with Private *L* in the presence of others. *See id.* at 903.

[8] *Id.*

[9] The "victim" of an indecent act offense need not be a woman. *See, e.g.*, United States v. Annal, 32 C.M.R. 427 (C.M.A. 1963); United States v. Holland, 31 C.M.R. 30 (C.M.A. 1961). Moreover, indecent acts under article 134 need not involve another person. *See, e.g.*, United States v. Sanchez, 29 C.M.R. 32 (C.M.A. 1960) (chicken); United States v. Mabie, 24 M.J. 711 (A.C.M.R. 1987) (corpse).

(2) That the act was indecent;[10] and

(3) That, under the circumstances, the conduct of the accused was . . . [prejudicial to] good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[11]

Military decisional law provides that physical touching is not a necessary element of the offense of indecent acts, although some participation by another person is essential.[12] Unlike the more aggravated offenses of taking indecent liberties with a child[13] and indecent assault,[14] indecent acts with another is a general intent crime—it does not require that the perpetrator entertain any particular *mens rea* as a precondition to liability.[15]

The case law also demonstrates clearly that even consensual acts may be indecent.[16] In *United States v. Woodard*,[17] for example, the Air Force Court of Military Review concluded that the accused committed an indecent act by engaging in consensual "heavy petting" with a sixteen-year-old girl.[18] The court observed that, although petting is not necessarily indecent, in the instant case the attendant circumstances rendered the accused's conduct indecent within the meaning of article 134.[19]

More specifically, military case law holds that consensual sexual intercourse constitutes an indecent act when performed in the presence of others.[20] In *United States v. Brundidge*[21] the Army Court of Military Review found that sexual intercourse in a three-person barracks room was public—and therefore indecent—when nonparticipants easily could have seen the act and were aware that it was happening, even though their immediate views of the act may have been blocked.[22] In *United States v. Berry*[23] the Court of Military Appeals likewise concluded that the accused's knowing participation in consensual fornication in a hotel room while

[10] The Manual explains that "'[i]ndecent' signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but [also] tends to excite lust and deprave the morals with respect to sexual relations." MCM, 1984, Part IV, para. 90*c*.

[11] *Id.*, Part IV, para. 90*b*. The final element reflects the requirements of proof for all article 134 offenses charged under the first and second clauses of that article. The first clause of article 134 addresses conduct that is prejudicial to good order and discipline in the Armed Forces. As the Manual for Court-Martial indicates, not every irregular, mischievous or improper act is a court-martial offense. *See id.*, Part IV, para. 60*c*(2)(c). Rather, the conduct must be directly and palpably prejudicial to good order and discipline to constitute a violation of the first clause of article 134. United States v. Sandinsky, 34 C.M.R. 343, 345 (C.M.A. 1964) (citing United States v. Holiday, 16 C.M.R. 28 (C.M.A. 1954)). The second clause of article 134 addresses service-discrediting conduct. To violate this clause, an accused's conduct must tend to bring the service into disrepute or tend to lower the service in public esteem. MCM, 1984, Part IV, para. 60*c*(3); *see also* United States v. Kirksey, 20 C.M.R. 272 (C.M.A. 1955). For a general discussion of the theories of prosecution under article 134, see TJAGSA Practice Note, *Mixing Theories Under the General Article*, The Army Lawyer, May 1990, at 66.

[12] United States v. Thomas, 25 M.J. 75 (C.M.A. 1987); United States v. Murray-Cotto, 25 M.J. 784 (A.C.M.R. 1988).

[13] *See* UCMJ art. 134; MCM, 1984, Part IV, para. 87; *see also* United States v. Payne, 41 C.M.R. 188 (C.M.A. 1970) (accused committed indecent act with a child by pulling down the child's underwear and placing his hands between her legs); United States v. Brown, 13 C.M.R. 10 (C.M.A. 1953) (accused committed indecent liberties with two children by willfully exposing his penis to them). *See generally* TJAGSA Practice Note, *Displaying Nonpornographic Photographs to a Child Can Constitute Taking Indecent Liberties*, The Army Lawyer, Aug. 1989, at 40 .

[14] *See* UCMJ art. 134; *see also* MCM, 1984, Part IV, para. 63; United States v. Wilson, 13 M.J. 247 (C.M.A. 1982) (accused committed indecent assault by engaging in nonconsensual, forcible "foreplay" with the victim before beginning sexual intercourse).

[15] *See* United States v . Brundidge, 17 M. J. 586 (A.C.M.R. 1983); United States v. Anderson, 10 M. J. 536 (A.C.M.R. 1980); United States v. Jackson, 31 C.M.R. 738, 741 (A.F.B.R. 1962).

[16] *See* United States v. Carreiro, 14 M.J. 954, 958-59 (A.C.M.R. 1982); United States v. Johnson, 4 M.J. 770, 771 (A.C.M.R. 1978); *see also* United States v. Thacker, 37 C.M.R. 28 (C.M.A. 1966) .

[17] 23 M.J. 514 (A.F.C.M.R. 1986), *vacated on other grounds*, 24 M.J. 514 (A.F.C.M.R. 1987).

[18] *Woodard*, 23 M.J. at 516; *see also* United States v. Moore, 33 C.M.R. 667, 670 (C.G.B.R. 1963) (consensual homosexual acts can constitute indecent acts with another).

[19] *Woodard*, 23 M.J. at 516-17. The court pointedly observed that "Miss *H*," the young woman with whom the accused committed the offense, was baby-sitting for a friend when the accused approached her, that *H* was barely past the age of consent and the accused was twelve years her senior, and that the accused was married to another woman. *See id.* at 514.

[20] Private sexual intercourse between unmarried persons is not punishable under the UCMJ. *See* United States v. Hickson, 22 M.J. 146, 150 (C.M.A. 1986).

[21] 17 M.J. 586 (A.C.M.R. 1983).

[22] *Id.* at 587; *see also* United States v. Scoby, 5 M.J. 160, 164-65 (C.M.A. 1978) (fellatio in a "semiprivate" living area in the immediate vicinity of several others who may have been asleep was performed in a public place); United States v. Linnear, 16 M.J. 628 (A.F.C.M.R. 1983) (fellatio occurred in a public place when it was performed in a snack bar behind a closed screen-door while bystanders waited outside for the snack bar to open).

[23] 20 C.M.R. 325 (C.M.A. 1956).

another couple was present constituted a violation of article 134.[24] The court stressed that it found the accused's behavior no less discrediting because the other persons present had been engaged in similar conduct.[25] Conversely, the Navy-Marine Corps Court of Military Review concluded in *United States v. Carr*[26] that consensual sexual intercourse was not "open and notorious," and, therefore, did not violate article 134, when the act occurred at night in a closed area of a public beach, the accused and his partner were obscured partially by a tent, and they plainly intended not to be seen.[27]

The commission of indecent acts with another has been recognized judicially as a lesser-included offense of several aggravated sex crimes. In *United States v. Anderson*,[28] for example, the Army Court of Military Review found the accused's commission of indecent acts to be a lesser-included offense of attempted rape.[29] In *United States v. Hunt*[30] the Air Force Court of Military Review observed that commission of indecent acts with another could be a lesser-included offense of forcible sodomy[31] and of attempted forcible sodomy.[32] Similarly, in *United States v. Carter*[33] the Army Board of Review affirmed an accused's conviction for indecent acts as a lesser-included offense of indecent assault.

Significantly, in cases involving charges of aggravated, nonconsensual sex crimes, the indecent acts that the appellate courts and boards identified as lesser-included offenses were likewise nonconsensual. The various services' courts and boards of review have been much less sanguine in finding consensual indecent acts to be lesser-included offenses of aggravated, nonconsensual sex crimes such as rape. In *United States v. Watts*[34] the Navy-Marine Corps Court of Military Review ruled that an accused's consensual indecent act with another is not a lesser-included offense of the offense of rape—at least when the Government employs a "short-form" specification to allege the rape.[35] The Air Force Board of Review and the Army Board of Review reached similar conclusions.[36]

This differentiation between consensual and nonconsensual indecent acts when the indecent acts are alleged to be lesser-included offenses of nonconsensual sex offenses is founded upon the gravamens of these separate classes of crimes. As Chief Judge Everett explained in *United States v. Hickson*,[37]

> Now—both in military law and in many states—there exists a hierarchy of sex offenses. At the top is rape—intercourse against the will of the victim—for which the punishment of up to life imprisonment is often provided. Where intercourse is absent but illicit sexual activity and force are present, a lesser crime has been committed, such as assault with intent to rape or indecent assault; but even for such offenses the penalty is quite severe. Where force is absent but illicit intercourse remains, a different crime—such as carnal knowledge, adultery, bigamous cohabitation, or "open and notorious" fornication—has been committed. If no aggravating factor is present, then generally society does not treat the sexual conduct as criminal.[38]

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[24] *Id.* at 330.

[25] *Id.*

[26] 28 M.J. 661 (N.M.C.M.R. 1989).

[27] *Id.* at 665-66.

[28] 10 M.J. 536 (A.C.M.R. 1980).

[29] *See* UCMJ art. 80.

[30] 5 M.J. 804 (A.F.C.M.R. 1978).

[31] *See* UCMJ art. 125; MCM, 1984, Part IV, para. 51.

[32] *See* UCMJ art. 80.

[33] 39 C.M.R. 764 (A.B.R. 1968).

[34] 19 M.J. 703 (N.M.C.M.R. 1984).

[35] *Id.* at 705; *accord* United States v. Ambalada, 1 M.J. 1132, 1137 (N.C.M.R. 1977).

[36] *See* United States v. Burns, 25 C.M.R. 791, 794-95 (A.F.B.R. 1957); United States v. Nicholson, 22 C.M.R. 402, 405 (A.B.R. 1956). *But cf.* United States v. Cheatham, 18 M.J. 721, 721-22 (A.F.C.M.R. 1984) (holding that a nonconsensual indecent act is a lesser-included offense of rape, even when the rape is pleaded in a "short-form" specification).

[37] 22 M.J. 146 (C.M.A. 1986).

[38] *Id.* at 154-55 (footnotes and citations omitted).

The Chief Judge further explained that,

> [b]ecause force is missing [in consensual sexual offenses] but another aggravating factor is present, such offenses are not lesser-included in rape, "unless the added circumstance or element is one which is necessarily encompassed within the specification under which the accused is arraigned, considering the form and language of the specification, and considering the circumstances relied upon by the government to make out its case."[39]

The Navy Court of Military Review expressed similar reasoning several years earlier[40] when it wrote that consensual sexual offenses, such as "fornication[,] are offenses against the morals of society rather than the person of one of the participants. They do not involve an element of assault, such as is implicit in the heinous crime of rape and the offenses commonly recognized as lesser-included in a charge of rape."[41]

Applying the Law to the Facts in *King*

Against this decisional landscape, the Army court considered whether King could be convicted of consensual indecent acts as a lesser-included offense of a rape alleged in the "short-form" specification. The court's decision essentially turned on the adequacy of the rape specification to allege all the elements of an indecent act with another and to alert the accused that he had to defend against the lesser-included offense of a consensual indecent act.

The seminal military case addressing the adequacy of specifications is *United States v. Sell*.[42] In *Sell*, the Court of Military Appeals announced the following three-part test for assessing the adequacy of a specification:

> The true test of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he [or she] must be prepared to meet; and, in case any other proceedings are taken against him [or her] for a similar offense, whether the record shows with accuracy to what extent he [or she] may plead a former acquittal or conviction.[43]

The military courts have interpreted the first component of the *Sell* test as requiring the Government to allege all the elements of an offense, either directly or by fair implication. In *United States v. Brown*,[44] for instance, the Army Court of Military Review determined that the terms "Patton Enlisted Men's Club" and "Mainz Officers' and Civilians' Open Mess" by fair implication alleged a building or structure for purposes of housebreaking.[45] In *United States v. Knight*,[46] on the other hand, the Court of Military Appeals decided that the words "burglariously enter," when used in a burglary[47] specification, did not allege by fair implication that the accused's misconduct included a "breaking and entering" as is required for that offense.[48]

Addressing the first component of the *Sell* test,[49] the *King* court noted that for the accused's consensual fornication to violate article 134 as an indecent act, the Government would have to allege some "added circumstance" in the specification and would have to prove it beyond a reasonable doubt.[50] This added circumstance must demonstrate that the accused's otherwise innocent conduct was prejudicial to good order and discipline or was service-discrediting.

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[39] *Id.* at 154 n.11 (quoting *Burns*, 25 C.M.R. at 794) (citation omitted).

[40] *See generally Ambalada*, 1 M.J. at 1132.

[41] *Id.* at 1137.

[42] 11 C.M.R. 202 (C.M.A. 1953).

[43] *Id.* at 206.

[44] 42 C.M.R. 656 (A.C.M.R. 1970).

[45] *See* UCMJ art. 130; MCM, 1984, Part IV, para. 56*b*(1), *c*(4). *See generally* TJAGSA Practice Note, *Housebreaking Includes More Than Breaking Into a House*, The Army Lawyer, Apr. 1989, at 56.

[46] 15 M.J. 202 (C.M.A. 1983).

[47] *See* UCMJ art. 129; MCM, 1984, Part IV, para. 55.

[48] *See* MCM, 1984, Part IV, para. 55*b*(1), *c*(2)-(3). *See generally* TJAGSA Practice Note, *Burglary and the Requirement for a Breaking*, The Army Lawyer, Jan. 1990, at 32.

[49] *See generally* MCM, 1984, Rule for Courts-Martial 307(c)(3) [hereinafter R.C.M.]; *id.* discussion (G)(i) (adopting the first component of the *Sell* test)

[50] Surprisingly, the court in *King* neither cited *Sell* specifically, nor expressly applied the components of the *Sell* test.

In *King*, the sole added circumstance was that the accused's fornication occurred in the presence of others.[51] The court in *King*, however, correctly found that the Government neither directly, nor by fair implication, alleged this added circumstance in the specification. Accordingly, the specification failed to meet the first requirement of the *Sell* test.

The Court of Military Appeals has interpreted and applied the second component of the *Sell* test—that a specification must notify the accused of the offenses against which he or she must defend[52]—in several significant decisions. In *United States v. Curtiss*,[53] for example, the court concluded that a specification alleging that the accused wrongfully appropriated[54] "personal property" belonging to a Marine Corps facility provided the accused with insufficient notice of the *res* of the alleged offense.[55]

The court in *King* essentially concluded that the "short-form" rape specification failed to satisfy the second component of the *Sell* test, holding that it did not notify the accused that his consensual indecent act was a potential lesser-included offense.[56] Noting that "force is essential to finding rape," the court observed that, because "force is not present in consensual sexual offenses, those offenses are simply not present [as lesser-included offenses] in a specification that alleges only that an accused did rape *X*."[57]

The court's conclusion that the specification failed to provide adequate notice is bolstered by the statutory test for determining whether a particular crime is a lesser-included offense under military law. Article 79 of the Uniform Code of Military Justice (UCMJ) provides that "[a]n accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein."[58] Over thirty-five years ago, in *United States v. Duggan*,[59] the Court of Military Appeals divined the congressional intent underlying article 79, stating that "[w]hen both offenses are substantially the same kind so that [the] accused is fairly apprised of the charges he [or she] must meet and the specification alleges fairly, and the proof raises reasonably, all elements of both crimes, . . . they stand in the relationship of greater and lesser offenses."[60]

More recently, in *United States v. Baker*,[61] the court established a two-part test for determining whether two crimes stand in relationship to each other as greater and lesser offenses. The court wrote,

> Assuming both offenses arise out of one transaction, one offense may be a lesser-included offense of another offense in two situations: First, where one offense contains only elements of, but not all the elements of the other offense; second, where one offense contains different elements as a matter of law from the other offense, but these different elements are fairly embraced in the factual allegations of the other offense as established by evidence introduced at trial.[62]

As *King* demonstrates, a consensual indecent act fails as a lesser-included offense of rape under both prongs of the *Baker* test when the rape is alleged in a "short-form" specification.

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[51] The specification alleged that the accused was a noncommissioned officer and his partner was a private. Nevertheless, the court concluded that, because the Government had alleged no abuse of the superior-subordinate relationship in the specification, the difference in military status "was not a possible element to sustain a conviction under article 134." *King*, 29 M.J. at 903 (citing United States v. Smith, 7 M.J. 842 (A.C.M.R. 1979)); *see also* MCM, 1984, Part IV, para. 83. *See generally* United States v. Mayfield, 21 M.J. 418 (C.M.A. 1986).

[52] *See generally* R.C.M. 307(c)(3); *id.* discussion (G)(iii) (adopting the second component of the *Sell* test).

[53] 42 C.M.R. 4 (C.M.A. 1970).

[54] *See* UCMJ art. 121(a)(2); MCM, 1984, Part IV, para. 46*b*(2), *c*(2).

[55] *Curtiss*, 42 C.M.R. at 5. *But see* United States v. Alcantara, 40 C.M.R. 84 (C.M.A. 1969) (holding that a specification alleging the theft of "foodstuffs" to be sufficiently definite to identify the property purportedly taken).

[56] Obviously, the first and second components of the *Sell* test are interrelated. Notice to an accused generally is inadequate whenever a specification fails to allege all the elements of proof.

[57] *King*, 29 M.J. at 902.

[58] *See also* UCMJ art. 51(c)(3).

[59] 15 C.M.R. 396 (C.M.A. 1954).

[60] *Id.* at 399-400. The Air Force Court of Military Review likewise announced that "[a]n included offense exists when the specification, expressly or by fair implication, puts an accused on notice that he [or she] must defend against the included offense as well as the offense specifically charged." United States v. Dorion, 17 M.J. 1064, 1065 (A.F.C.M.R. 1984).

[61] 14 M.J. 361 (C.M.A. 1983).

[62] *Id.* at 368; *see also* United States v. Zubko, 18 M.J. 378 (C.M.A. 1984); United States v. DiBello, 17 M.J. 77 (C.M.A. 1983).

The first prong of *Baker* remains unsatisfied because all indecent acts offenses require as an element of proof evidence that "the act was indecent."[63] "Indecent," as used in this context, "signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but [also] tends to excite lust and deprave the morals with respect to sexual relations."[64] When a consensual indecent act such as public fornication is in issue, the indecency must be established by proof of an element that is not expressed directly in a "short-form" rape specification. Specifically, the "short-form" specification does not aver, either directly or by fair implication, that the intercourse occurred in the presence of others.[65] Because a bare allegation of rape does not contain all the elements for a consensual indecent act, the latter crime is not a lesser-included offense of rape under the first prong of the *Baker* test.

Public fornication also fails as a lesser-included offense under the second prong of the *Baker* test. The element of indecency requisite to the crime of indecent acts with another is not embraced fairly in a "short-form" rape specification. Indeed, a "short-form" rape specification actually fails to allege any circumstance that would render the accused's *consensual* sexual conduct indecent.

In *King*, the lack of fair notice in the specification was exacerbated by the timing of the Government's request to prosecute the accused for committing a consensual indecent act. Had the Government informed the accused before trial of its intent to proceed on the rape charge with the understanding that public fornication was a possible lesser-included offense, the defense could have made an appropriate motion to the military judge or sought other relief.[66] The Government, however, did not reveal its intent to proceed on the lesser offense until the accused effectively confessed to that offense before the court-martial and the military judge. The prejudicial effect of the accused's failure to receive adequate notice was undeniable.

Avoiding the Problems in *King*

The key to avoiding the problems the Army court addressed in *King* lies in thoughtful and comprehensive preparation. From the earliest stages of preparing the Government's case, the trial counsel must examine the evidence critically and must anticipate whether proving lack of consent for rape, or other aggravated sex offenses, will be problematic. Difficulties of this sort almost invariably are foreseeable before the trial begins. Only rarely should a well-prepared trial counsel be tripped up at the court-martial by an unanticipated difficulty in proving lack of consent.

When the trial counsel identifies a potential difficulty in proving a lack of consent, he or she can respond in one of two ways. One option is to modify the "short-form" rape specification[67] so that it fairly embraces all the elements of a consensual indecent acts offense.[68] For example, the trial counsel could amend the specification to allege expressly that

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[63] MCM, 1984, Part IV, para. 90*b*(2).

[64] *Id.*, Part IV, para. 90c. Arguably, this requirement for indecency is not subsumed within the elements of proof for rape under military law. Under military law, the essential elements of rape are:

(a) That the accused committed an act of sexual intercourse with a certain female;

(b) That the female was not the accused's wife; and

(c) That the act of sexual intercourse was done by force and without consent.

Id., Part IV, para. 45*b*(1).

Although the elements for rape do not allege explicitly that the accused rapist's conduct is "indecent," at least one court has concuded that when the Government charges an accused with rape, it indirectly alleges an element of indecency. *See United States v. Cheatham*, 18 M.J. 721 (A.F.C.M.R. 1981) (nonconsensual indecent acts with another is a lesser-included offense of rape, even when rape is alleged in a "short-form" specification).

[65] *See King*, 29 M.J. at 903.

[66] Had the Government made this motion, however, the defense counsel probably would have responded that, because consensual indecent acts is not a lesser-included offense of rape, amending the rape specification to accommodate the Government would be a major change to the charges. *See* R.C.M. 603(a). A military judge may not permit a major change after arraignment over a defense objection. R.C.M. 603(c). The defense counsel also could contend that modifying the rape specification so that it would embrace the elements of consensual indecent acts would create a duplicitous specification in violation of R.C.M. 307(c)(4). The defense counsel then could argue that the separate charge of indecent acts would have to be preferred. *See generally* R.C.M. 307; United States v. Nicholson, 1 M.J. 616 (A.C.M.R. 1975). Assuming, *arguendo*, that the judge found that the Government's request to modify the rape specification did not constitute a major change, the defense still could move for a bill of particulars, if appropriate. R.C.M. 906(b)(6).

[67] For purposes of this discussion, the author assumes that the accused is charged with rape. The same concerns, however, apply to any nonconsensual sex crimes alleged as a greater offense. *See generally supra* notes 34-41 and accompanying text.

[68] *See generally* United States v. Little, 44 C.M.R. 833 (A.F.C.M.R. 1971) (language in an aggravated assault specification alleging that the accused threatened the victim, although extraneous to the assault charge, was sufficient to allege the necessary elements of the lesser-included offense of communicating a threat).

the intercourse was indecent because it occurred in the presence of others. Thus amended, the specification could read as follows:

> In that Private First Class John D. Doe, U.S. Army, did, at Fort Blank, Missouri, on or about 9 June 1992, *knowingly and willfully in the presence of others,* rape Ann A. Jones.[69]

This specification alleges the added circumstances that would render consensual intercourse indecent within the meaning of article 134. Nevertheless, several potential problems with this approach are apparent.

First, the specification arguably is duplicitous.[70] It essentially alleges two separate offenses in a single specification. Admittedly, in this case a defense counsel probably would profit little by moving to sever,[71] but even so, trial counsel should avoid duplicitous pleading, absent overriding practical reasons.[72]

Second, the defense could argue credibly that the modified rape specification still fails to allege all the elements of a consensual indecent act. For example, the specification does not allege expressly that the accused's conduct was "indecent"—the second element of proof for indecent acts with another.[73] Significantly, the sample specification for indecent acts includes the allegation that the accused "wrongfully commit[ted] an *indecent* act . . . ."[74] Further enlarging the rape specification, however, to include this or similar language would make the allegation unwieldy and would exacerbate the duplicity problem noted above.[75]

Third, enlarging the rape specification to embrace a consensual indecent act may create difficulties when findings are entered. If the fact-finder is convinced that the accused is guilty of rape, the additional language in the rape specification could be excepted easily.[76] The fact-finder, however, could determine that the accused should be convicted of committing a consensual indecent act. It then would have to resort to complicated procedures for excepting and substituting language. In a trial by members, the military judge would have to explain the exception and substitution procedures to the court-martial and ensure that they are understood.[77] In either case, a real possibility exists that prejudicial errors could result.[78]

Finally, any approach to pleading that involves a departure from the form specifications must be viewed with great caution. Almost invariably, the form specification is a proven method for alleging criminal misconduct.[79] Although deviations from the form specification are not prejudicial per se,[80] any variation from a form specification risks prejudicial error, even if the defense counsel does not object to it at trial.[81]

The trial counsel's other recourse—and the better approach—is to charge rape and consensual indecent acts alter-

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[69] This specification is a modification of the standard "short-form" rape specification found at MCM, 1984, Part IV, para. 45*f*(1). The italicized language has been added to the "short-form" rape specification expressly to allege the added circumstance that rendered the consensual intercourse indecent.

[70] *See generally* R.C.M. 307(c)(4).

[71] *See generally* United States v. Hiatt, 27 M.J. 818 (A.C.M.R. 1988).

[72] *See generally* United States v. Poole, 24 M.J. 539 (A.C.M.R. 1987), *aff'd*, 26 M.J. 272 (C.M.A. 1988) (upholding the Government's use of so-called "mega-specifications" in bad check cases); Henry R. Richmond, *Bad Check Cases: A Primer for Trial and Defense Counsel*, The Army Lawyer, Jan. 1990, at 3, 5 ("[f]or reasons of efficiency, trial counsel often charge check offenses by using 'mega-specifications'").

[73] MCM, 1984, Part IV, para. 90*b*(2).

[74] *Id.*, Part IV, para. 90*f* (emphasis added).

[75] The modified rape specification also fails to allege "that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces." The quoted language alleges the third and final element of proof for indecent acts, *see* MCM, 1984, Part IV, para. 90*b*(3), and is required for all offenses tried under the first two clauses of article 134. *See supra* note 11. The failure to include this language in the rape specification, however, would not preclude the accused's conviction for a lesser-included offense under article 134. *See* United States v. Mayo, 12 M.J. 286, 293 (C.M.A. 1982); United States v. Herndon, 4 C.M.R. 53 (C.M.A. 1952); United States v. Marker, 3 C.M.R. 127 (C.M.A. 1952); *see also* United States v. Long, 6 C.M.R. 60 (C.M.A. 1952); United States v. O'Neal, 26 C.M.R. 924, 928 (C.G.B.R. 1958).

[76] *See generally* United States v. Cimoli, 10 M.J. 516 (A.F.C.M.R. 1980) (additional language in a specification alleging wrongful use of marijuana can be treated as surplusage).

[77] *See generally* United States v. London, 15 C.M.R. 90 (C.M.A. 1954); Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 2-30, at 2-36.1 (C3, 15 Feb. 1989).

[78] *See generally* United States v. Ricketts, 1 M.J. 78 (C.M.A. 1975).

[79] *See generally* United States v. Vidal, 23 M.J. 319, 324 (C.M.A. 1987) (standard form specification was sufficient to allege that the accused raped the victim either as a perpetrator or as an abettor).

[80] *See, e.g.*, United States v. Bryant, 28 M.J. 504 (A.C.M.R. 1989); United States v. Simpson, 25 M.J. 865 (A.C.M.R. 1988).

[81] *See, e.g., Knight*, 15 M.J. 202 (C.M.A. 1983).

natively.[82] Military law long has recognized that "[i]nconsistency in allegations . . . is permissible to allow for contingencies of proof."[83] Perhaps the most common example of alternative charging involves a prosecution for the distribution of a purported controlled substance that later is found to be a harmless substitute.[84] If the accused knew the substance was harmless, but intended to obtain payment for the purported drugs by misleading the purchaser, he or she is guilty of larceny by false pretenses.[85] On the other hand, if the accused mistakenly believed that the substance he or she was selling was an illegal drug, the accused is guilty of attempted distribution of a controlled substance.[86] Although these charges are inconsistent—and the accused therefore could not be convicted of both of them[87]—the Government may allege both offenses because of exigencies of proof. Other examples of inconsistent offenses that may be charged alternatively are wrongful appropriation of a rental car and dishonorably failing to pay a just debt incurred after the deadline for returning the car,[88] and larceny and receiving stolen property when the Government is unsure whether the accused stole or received the property in question.[89]

Concerning sex offenses, the Court of Military Appeals has recognized that rape (a nonconsensual offense) and adultery (a consensual offense)[90] may be pleaded in the alternative, even though they are mutually inconsistent.[91] Similarly, the court has allowed the Government to allege alternatively the inconsistent offenses of fraternization (a consensual offense)[92] and indecent assault (a nonconsensual offense).[93] This precedent should permit the Government to advance alternative allegations of rape and consensual indecent acts.

Using alternative charges also avoids the drawbacks associated with expanding the "short-form" rape specification to embrace consensual indecent acts. Alternate charging cannot violate the rule against duplicitous specifications because the separate rape and indecent acts specifications each allege a single offense. Moreover, the two specifications allege every element of both offenses directly, thereby assuring compliance with the first part of the *Sell* test. Actually, because the Government would use the form specifications for rape and for indecent acts with another, this approach should comply with *all* of *Sell*'s requirements. Finally, using alternative charges and specifications eliminates the need for complicated findings by exceptions and substitutions. The military judge needs only to instruct the members to select the alternative charge and specification—if any—that the evidence supported beyond a reasonable doubt.

Conclusion

As *King* indicates, consensual sexual intercourse can violate the UCMJ if the particular circumstances that make the conduct criminal are pleaded and proven. Specifically, the trial counsel must allege circumstances that demonstrate that the accused's behavior was service-discrediting or prejudicial to good order and discipline. A "short-form" rape specification does not allege these circumstances adequately. Accordingly, an accused cannot be found guilty of a consensual indecent act as the lesser-included offense of a rape charge alleged in a "short-form" specification.

Nevertheless, an accused may be convicted of a consensual indecent act as an alternate offense to, or a lesser-included offense of, rape if the indecent acts offense is alleged properly. Arguably, a trial counsel could expand the "short-form" rape specification to embrace a consensual indecent acts offense. Several serious problems, however, could arise from the use of this approach. Instead, a trial counsel should charge rape and consensual indecent acts alternatively, then ask the military judge to instruct the fact-finder to convict the accused of the single offense—if any—that is proved by the evidence.

The suggested approach contemplates that counsel will prepare the case early and well. It comports with the general rule that prompt, thorough pretrial preparation is a key to the effective prosecution or defense of an accused at a court-martial.

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[82] In *King*, the court actually observed that the trial counsel "could have charged indecent acts with another in the alternative to rape." *King*, 29 M.J. at 903.

[83] United States v. Mayfield, 21 M.J. 418, 421 (C.M.A. 1986).

[84] *See, e.g.*, United States v. Williams, 3 M.J. 555 (A.C.M.R. 1977).

[85] *See* UCMJ art. 121(a)(1); MCM, 1984, Part IV, para. 46c(1)(e).

[86] *See* UCMJ art. 80.

[87] United States v. Cartwright, 13 M.J. 174 (C.M.A. 1982).

[88] United States v. Hale, 28 M.J. 310 (C.M.A. 1989).

[89] *See Cartwright*, 13 M.J. at 175.

[90] *See* UCMJ art. 134; MCM, 1984, Part IV, para. 62.

[91] United States v. Hickson, 22 M.J 146, 155 (C.M.A. 1986).

[92] *See* UCMJ art. 134; MCM, 1984, Part IV, para. 83.

[93] United States v. Mayfield, 21 M.J. 418, 421 (C.M.A. 1986).

German Environmental Law: A Primer

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Introduction

Personnel serving in the United States Army, Europe (USAREUR), regularly face the challenge of operating in a foreign legal system. Some of the most complex and controversial foreign legal issues arise in the field of environmental law. Judge advocates can expect these issues to multiply as the drawdown in Europe continues, especially in Germany, where the overwhelming majority of USAREUR installations are located.

Soldiers and Army civilian employees must be familiar with German environmental law if they are to comply with United States policy, international treaty obligations, and Army regulations. United States foreign policy provides that, in performing their missions overseas, the military departments must comply with environmental pollution control standards of general applicability in their host countries.[1] The North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA) also requires United States personnel to respect the laws of host nations.[2] A recent Department of Defense (DOD) directive mandates the development of basic guidelines to establish environmental standards and to promote environmental protection at DOD installations overseas.[3] The directive, however, warns that a military installation should abide by these guidelines only to the extent that they are more stringent than the host nation's standards.[4] Finally, USAREUR regulations expressly require commanders to comply with the substantive portions of the environmental laws applicable to USAREUR activities.[5]

German Federal Environmental Law [6]

Environmental Provisions of the German Criminal Code

Three provisions of the German Criminal Code directly affect American military activities in Germany. The first, appearing at section 324 of the Code, prohibits the unauthorized[7] contamination of waters, as well as any other conduct that impairs water quality.[8] The term "water" includes surface water, groundwater, and the open seas.[9]

Unlike other forms of water pollution defined in the Criminal Code, "contamination" involves an outwardly perceptible alteration of the water.[10] This distinction, however, may be unimportant in practice because all forms of

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[1] Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (1978); Dep't of Defense Directive 6050.7, Environmental Effects Abroad of Major Department of Defense Actions (Mar. 31, 1979); *see also* John L. Fugh *et al.*, *The Commander and Environmental Compliance*, The Army Lawyer, May 1990, at 3 (citing Secretary of Defense Memorandum, subject: Environmental Management Policy, 10 Oct. 1989, in which Secretary Richard Cheney stated that environmental compliance must be a command priority at all levels).

[2] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, art. II, 4 U.S.T. 1792, 199 U.N.T.S. 67.

[3] Dep't of Defense Directive 6050.16, DOD Policy for Establishing and Implementing Environmental Standards at Overseas Installations (Sept. 20, 1991).

[4] *Id.*

[5] U.S. Army Europe Reg. 200-1, USAREUR Environmental Program, para. 6*a* (31 Jan. 1983) (Cl, 23 Sept. 1986) [hereinafter USAREUR Reg. 200-1]. A revision of USAREUR Regulation 200-1 currently is under review.

[6] A discussion of civil environmental statutes at the state (*Land*) level, or of environmental regulations at the federal and state level, would exceed the scope of this article. No separate body of state criminal law exists in Germany.

[7] "Unauthorized," as used by the criminal provisions, generally means "unjustified" or "conduct for which there is no defense." Verhandlungen des Deutschen Bundestages [BT-Drucksache], 8/2382, at 14 (the *Verhandlungen des Deutschen Bundestages* is a report of the proceedings of the German Federal Parliament); Czychowski, *Das Neue Wasserstrafrecht im Gesetz zur Bekaempfung der Umweltkriminalitaet—Entwurf eines Sechzehnten Strafrechtsaenderungs-gesetzes*, 19 Zeitschrift fuer Wasserrecht, [ZfW] 205, 208 (1980).

[8] Strafgesetzbuch [StGB] § 324. For a translation of the *Strafgesetzbuch*, see U.S. Army Europe, Pam. 550-19, Compilation of Selected German Laws and International Agreements Applicable in Germany, annex A (7 Mar. 1985) (Cl, 13 Aug. 1985). The equivalent American legislation to section 324 is the Federal Water Pollution Control Act [hereinafter Clean Water Act], 33 U.S.C.A. § 1251 (West 1986 & Supp. 1991), which prohibits the unlawful discharge of pollutants into the waters of the United States. Together with the other major United States environmental statutes, *see infra* notes 17, 25, the Clean Water Act provides for both criminal and civil penalties.

[9] StGB, *supra* note 8, § 330*d*; *see* BT-Drucksache, *supra* note 7, 8/2382, at 13; *id.*, 8/3633, at 24-25 (discussing the meaning of "open seas").

[10] Czychowski, *supra* note 7, at 207; BT-Drucksache 8/2382, *supra* note 7, at 14 .

water pollution—whether physical, chemical, or biological[11]—have the same legal consequences. Although de minimus violations are not punishable under section 324,[12] an individually inconsequential discharge still may give rise to criminal liability if the cumulative effect of the discharge is detrimental to the environment.[13] To obtain the conviction of an alleged polluter under section 324, the German Government need not show that a discharge actually harmed or contaminated a specific body of water. It may prevail simply by proving that an injury occurred and that the substance the polluter discharged is capable of causing that injury.[14]

In USAREUR, the greatest potential for violations of section 324 arises from the releases of various harmful substances incident to vehicle maintenance. These substances, which include solvents, lubricants, and fuels, frequently cause groundwater contamination when they are spilled or allowed to escape as runoff from maintenance sites.[15]

Section 325 of the Criminal Code proscribes the operation of any "installation" that, through the breach of an administrative duty,[16] adversely affects air quality.[17] In particular, the statute focusses on the release of dust, gases, fumes, or odorous vapors that are capable of injuring human health, animal or plant life, or property of considerable value. The statute also prohibits any activity that generates noise loud enough to impair human health.[18] Injuries falling under the antinoise provision include disruption of sleep or concentration, digestive and circulatory complications, and hearing loss.[19]

The term, "installation," is defined broadly. It encompasses any facility, whether mobile or stationary, that produces harmful emissions.[20] Whether an emission actually harms air quality depends on the nature, extent, and persistence of its environmental impact, viewed both individually and cumulatively.[21] Significantly, section 325 does not require proof that the emission actually produces an injury. Rather, the Government need only show that a sufficient probability exists, based on the best available scientific data, that the installation could cause air or noise pollution.[22]

Section 325 applies only to emissions that cause damages outside the subject facility.[23] Injuries arising on the premises are governed by occupational safety and health regulations.[24]

Section 326 of the Criminal Code prohibits the unauthorized disposal of waste at an unlicensed facility, as well as any disposal of waste in a manner inconsistent with applicable federal, state, or local procedures.[25] This provision governs the handling of any form of waste that: (1) may cause or spread an infectious disease; (2) is explosive, inflammable, or radioactive; or (3) because of its nature or quantity, probably will have a substantial, detrimental impact

[11] Gesetz zur Ordnung des Wasserhaushalts (Wasserhaushaltsgesetz) [WHG] § 22, 1986 Bundesgesetzblatt [BGBl] Teil I 1529, *amended by* 1990 BGBl I 205; Judgment of May 22, 1987, Oberlandesgericht [OLG] Frankfurt, 40 Neue Juristische Wochenschrift [NJW] 2753, 2754 (1987); Judgment of Oct. 31, 1986, Bundesgerichtshof [BGH], BGHR Strafsachen (1987); *see also* BT-Drucksache, *supra* note 7, 8/2382, at 14. An *Oberlandesgericht* is a state superior court; the *Bundesgerichtshof* is the Federal Supreme Court.

[12] *See, e.g.*, Judgment of Feb. 2, 1986, OLG Celle, 39 NJW 2326 (1986); BT-Drucksache 8/3633, at 29.

[13] Steindorf, Strafgesetzbuch, Leipziger Kommentar § 324, at 27 (1988).

[14] Judgment of May 22, 1987, OLG Frankfurt, 40 NJW 2753, 2755 (1987).

[15] Memorandum, Facilities Engineering Division, HQ, U.S. Army Europe, subject: German Criminal Prosecution of a USAREUR Community for Environmental Offenses, 6 July 1990 [hereinafter USAREUR Memorandum].

[16] The "administrative duty" is breached by violating an administrative order or a regulatory permit requirement. StGB, *supra* note 8, § 325.

[17] *Id.* In the United States, air quality is regulated by the Clean Air Act, 42 U.S.C.A. § 7401 (West 1986 & Supp. 1991), which proscribes air pollution beyond established legal limits and sets emission standards for specific pollutants.

[18] StGB, *supra* note 8, § 325.

[19] Sack, Kommentar zum Umweltschutz-Strafrecht § 325, at 29-30 (1990).

[20] *Id.* at 7.

[21] Steindorf, *supra* note 13, § 325, at 77.

[22] Sack, *supra* note 19, § 325, at 9, 20; *see also* BT-Drucksache, *supra* note 7, 8/2382, at 16.

[23] StGB, *supra* note 8, § 325.

[24] BT-Drucksache, *supra* note 7, 8/2382, at 16.

[25] StGB, *supra* note 8, § 326. Two statutes govern waste management in the United States: the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.A. § 6901 (West 1986 & Supp. 1991), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), *id.* § 9601 (West 1986 & Supp. 1991). The RCRA established a comprehensive waste management program, which includes the regulation of waste disposal facilities, *id.* §§ 6944-6945, as well as a procedure for tracking hazardous waste from generation to disposal, *id.* § 6921. The CERCLA created a remedial program that targets preexisting hazards caused by waste disposal activities, *id.* § 9605, and a response program that governs releases of hazardous substances in emergency situations, *id.* § 9604.

on water, air, or soil quality.[26] The German Federal Supreme Court has ruled that even household waste may fall within the purview of section 326 if it is disposed of in sufficient quantities.[27]

Section 326 takes its definition of "waste" from a civil waste disposal statute.[28] This definition encompasses both a subjective and an objective component. An object or substance is considered waste if the person exercising control over it evinces a subjective intent to treat it as waste or if—regardless of the disposer's actual intent—the disposal of the object or substance has a definite, detrimental effect on public welfare or the environment.[29]

Regarding the subjective component of the definition, the intent to treat an object or substance as waste may be inferred from an outward manifestation of a desire to discard it permanently.[30] Conversely, the objective component is satisfied if disposal of the object or substance: (1) endangers human health; (2) endangers wildlife; (3) harms water or soil quality; (4) causes excessive air or noise pollution; (5) fails to accommodate urban planning considerations or to protect natural resources; or (6) otherwise endangers public safety or order.[31] Section 326 cases most commonly arise in connection with USAREUR activities when construction workers dispose of contaminated soil improperly.[32]

Civil Environmental Statutes

United States foreign policy and Army regulations require USAREUR personnel to comply only with the substantive environmental rules of their host nations.[33] Because the German civil statutes discussed below are primarily procedural, they are less vital to USAREUR than are the environmental provisions of the German Criminal Code. Nevertheless, to understand these statutes is important because the criminal provisions borrow heavily from the civil statutes' definitions and key concepts.[34]

Like the criminal provisions, separate civil statutes address each medium—water, air, and soil. The Waterways Act, for instance, prohibits the use of water without a permit.[35] The Act defines "use" broadly, to include water removal or drainage, the alteration of the natural course of a waterway, or the discharge of substances into water.[36]

Government officials normally will deny a permit application if a proposed use would damage the environment or would threaten public welfare.[37] Moreover, when a permitting authority does issue a permit, it may attempt to minimize the adverse environmental impact of the proposed use by imposing conditions on the permittee.[38] Under some circumstances, however, the law requires no permit. A user need not obtain a permit for a use undertaken to promote the national defense or to preserve public order.[39] Nor is a permit required for the use of surface water by the owner of the subject property;[40] use of groundwater for household purposes;[41] customary water uses, such as bathing or washing;[42] or any use related to fishing.[43]

A second statute, the Federal Emission Control Act, imposes a similar permit regime on activities that release pollutants into the atmosphere. The Act requires the owners and operators of hazardous facilities—that is, facilities whose operations pose a substantial risk to human health and the

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[26] StGB, *supra* note 8, § 326.

[27] Judgment of Oct. 31, 1986, BGH, 40 NJW 1280 (1987).

[28] *See* Gesetz ueber die Vermeidung und Entsorgung von Abfaellen (Abfallgesetz) [AbfG] § 4, 1986 BGBl I 1501, *amended by* 1990 BGBl I 205, 870; *see also infra* notes 47-51 and accompanying text.

[29] AbfG, *supra* note 28, § 1; *see also* Judgment of Apr. 26, 1990, BGH, 44 Monatsschrift fuer deutsches Recht [MDR] 737 (1990).

[30] *See, e.g.*, Judgment of May 21, 1985, OLG Koeln, 39 NJW 1117, 1118 (1986).

[31] AbfG, *supra* note 28, § 2.

[32] *See generally* USAREUR Memorandum, *supra* note 15.

[33] *See generally* Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (1978); USAREUR Reg. 200-1, para. 6c.

[34] Dreher & Troendle, Strafgesetzbuch und Nebengesetze at 1707 (1991) (commentary preceding section 324).

[35] WHG, *supra* note 11, § 3.

[36] *Id.*

[37] *Id.* § 6.

[38] *Id.* § 4.

[39] *Id.* § 17a.

[40] *Id.* § 24.

[41] *Id.* § 33.

[42] *See, e.g.*, Judgment of June 22, 1982, Bayerisches Oberstes Landesgericht [BayObLG], 22 ZfW 41 (1983).

[43] WHG, *supra* note 11, § 25.

environment—to obtain operating permits.[44] A permit will be issued only if the owner or operator indicates that he or she has taken appropriate measures to mitigate any detrimental effects that the facility's operations might cause.[45] Like the Waterways Act, the Emission Control Act empowers permitting authorities to condition the issuance of a permit on the applicant's compliance with specific requirements.[46]

The third major civil statute, the Waste Disposal Act, prohibits the treatment, storage, or disposal of waste at unlicensed facilities.[47] The government will not issue a permit if a proposed activity: (1) would violate any provision of a legally binding state waste disposal plan; (2) would cause injuries to the public welfare that could not be prevented or mitigated; (3) would not be managed responsibly; or (4) would compromise the rights of another.[48] An operating permit, however, is not necessary if neither the scope, nor the duration, of a proposed activity suggests that it will harm the environment.[49]

Facilities that treat, store, or dispose of hazardous wastes must comply with special record-keeping and tracking requirements.[50] The Waste Disposal Act identifies "hazardous waste" as waste that: (1) by virtue of its nature, condition, or quantity, poses a high degree of risk to human health or air or water resources; (2) is explosive or flammable; or (3) may be contaminated with an infectious disease.[51]

Environmental Enforcement Under German Law

Criminal Liability

In any criminal case, the party bearing primary criminal liability is the principal—that is, the chief perpetrator of the illegal act.[52] When the actions of more than one person satisfy the elements of an offense, the perpetrators may be charged as coprincipals.[53]

Section 14 of the Criminal Code imposes liability upon agents, partners, legal representatives, and employees for offenses committed by the organization with which they are affiliated.[54] In connection with sections 324 through 326, the German Government uses section 14 to prosecute *Beauftragte*—delegates appointed in accordance with civil environmental statutes to represent businesses and other organizations.[55] Each delegate assumes the responsibility of ensuring that his or her organization complies with applicable environmental requirements.[56] A delegate breaches his or her duty if he or she fails to provide government officials with accurate data or neglects to inform management of potential environmental violations.[57] If a delegate's breach of duty causes the delegator to commit an environmental offense, the delegate personally will be held liable.[58] Significantly, a delegate's exposure to liability depends not on the title of the position he or she occupies, but on the actual authority or discretion inherent in the position.[59]

A question arises whether USAREUR hazardous waste specialists and other American environmental engineers may be held liable under the delegation rule. Because the appointment of a delegate under the civil statutes is a procedural requirement, USAREUR environmental specialists could argue convincingly that they cannot be held liable as *Beauftragte*. Nevertheless, American personnel are not immune to prosecution. Criminal liability under German law attaches to *any* employee who violates a substantive provision of the Criminal Code, whatever the employee's position.[60]

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[44] Gesetz zum Schutz vor schaedlichen Umwelteinwirkungen durch Luftverunreinigungen, Geraeusche, Erschuetterungen und aehnliche Vorgaenge (Bundes-Immissionschutzgesetz) [BImSchG] § 4, 1974 BGBl III 2129-8, *amended by* 1990 BGBl I 880.

[45] *Id.* §§ 5-6.

[46] *Id.* § 7.

[47] AbfG, *supra* note 28, § 4; *see also supra*, notes 28-29 and accompanying text.

[48] AbfG, *supra* note 28, § 8.

[49] Judgment of Apr. 6, 1984, BayObLG, 6 Natur & Recht [NR] 246, 247 (1984).

[50] AbfG, *supra* note 28, § 11.

[51] *Id.* § 2.

[52] StGB, *supra* note 8, § 25.

[53] *Id.*

[54] *Id.* § 14.

[55] WHG, *supra* note 11, § 21*c*; BImSchG, *supra* note 44, § 53; AbfG, *supra* note 28, § 11*a*. The *Beauftragte* for civilian organizations often are board members, production directors, or the heads of the organizations' environmental divisions.

[56] Sack, *supra* note 19, § 324, at 67-68; Dahs, *Zur straflichen Haftung des Gewaesserschutzbeauftragten nach § 324 StGB*, 6 Neue Zeitschrift fuer Strafrecht [NStZ] 97, 99-100 (1986); Sander, *Rechtsstellung und Rechtsschutz des Betriebsbeauftragten fuer Gewaesserschutz aus der Sicht der Industrie*, 7 NR 47, 52-53 (1985).

[57] Sack, *supra* note 19, § 324, at 67-68.

[58] *Id.*

[59] Sander, *supra* note 56, at 54; Dahs, *supra* note 56, at 98.

[60] Sack, *supra* note 19, § 324, at 65-66; Steindorf, *supra* note 13, § 324, at 32 .

Any employer who orders his or her employees to engage in a prohibited activity may be held liable as a coprincipal.[61] When an employer—or a senior agent of an employer, such as the person in charge of a subject installation—delegates to an employee the duty of ensuring an installation's environmental compliance, the employer is liable for any violation of environmental law that may result from his or her negligence in selecting or in supervising the delegate.[62] The employer, however, is *not* liable for a delegate's acts if the delegate has exceeded his or her authority.[63]

Criminal liability may result not only from the commission of an offense, but also from the failure to take measures that are reasonably necessary to prevent an offense from occurring.[64] A culpable failure to act may be intentional or negligent;[65] however, only persons who have assumed a special duty of care, or *Garantenstellung*, may be held criminally liable for omissions.[66] A duty of care may derive expressly from a statutory provision or it may be implicit (typically attaching to a person when he or she brings about hazardous circumstances that may cause environmental damage).[67] The government cannot hold a person liable for a failure to act unless he or she could have prevented the damage[68] and he or she reasonably should have attempted to do so.[69]

Relationship Between Criminal and Administrative Law

German jurists are divided sharply on the proper role of administrative law in the enforcement of criminal environmental provisions.[70] The extensive debate on this issue stems from the adoption of certain administrative interpretations and implementations as binding guidance for applying key terms of the criminal provisions.[71] One example of this practice has evolved around the use of the term "unauthorized" in sections 324 and 326 of the Criminal Code. Many commentators argue that, at present, the administrative issuance of a permit or a license pursuant to civil statutes effectively "authorizes," or legalizes, the subject activity. This practice, they maintain, smacks of an usurpation of judicial powers because it permits administrative authorities to determine whether an activity constitutes a criminal violation.[72] This controversy is particularly relevant to criminal defendants who claim that their subject activities were authorized by administrative actions or by official statements.[73]

Sanctions for Criminal Violations

An intentional violation of sections 324 or 325 of the Criminal Code is punishable by up to five years' imprisonment.[74] The maximum sentence for an intentional violation of section 326 is three years' imprisonment.[75] A negligent violation of sections 324 or 325 is punishable by up to two years' imprisonment.[76] Under section 326, the maximum penalty for a negligent violation is imprisonment for one year.[77] Any violation of sections 324, 325, or 326 also may result in a fine, in an amount proportional to the accused's income.[78]

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[61] Sack, *supra* note 19, § 324, at 65-66.

[62] *Id.*; Steindorf, *supra* note 13, § 324, at 32.

[63] Sack, *supra* note 19, § 324, at 65-66.

[64] StGB, *supra* note 8, § 13; *see, e.g.*, Czychowski, *supra* note 7, at 206. For a recent application of this principle to an environmental case, see Judgment of July 4, 1991, BGH, BGHR Strafsachen (1991).

[65] Horn, Systematischer Kommentar zum Strafgesetzbuch § 324, at 21 (1990).

[66] Dreher & Troendle, *supra* note 34, § 13, at 85.

[67] *Id.*, at 86-91.

[68] *Id.*, at 91.

[69] *Id.*

[70] Schall, *Umweltschutz durch Strafrecht: Anspruch und Wirklichkeit*, 43 NJW 1263, 1265 (1990); Breuer, *Empfehlen sich Aenderungen des strafrechtlichen Umweltschutzes insbesondere in Verbindung mit dem Verwaltungsrecht?*, 41 NJW 2072 (1988).

[71] Schall, *supra* note 70, at 1265; Breuer, *supra* note 70, at 2073; Rudolphi, *Primat des Strafrechts im Umweltschutz?*, 5 NStZ 193 (1984).

[72] Schall, *supra* note 70, at 1265-66; Horn, *Umweltschutz durch Strafrecht*, 10 NR 63, 65-66 (1988).

[73] *See generally infra* notes 87-89 and accompanying text.

[74] StGB, *supra* note 8, §§ 324-325.

[75] *Id.* § 326.

[76] *Id.* §§ 324-325.

[77] *Id.* § 326.

[78] *Id.* §§ 40, 324-326.

Criminal Defenses

The following is a survey of defenses most often invoked in German criminal environmental cases.

1. *Necessity.* The defense of necessity exonerates a defendant of conduct that otherwise would be criminal if, owing to extreme circumstances, the defendant had to engage in that conduct to prevent the occurrence of a greater harm.[79] German courts, however, often have rejected this defense in environmental cases, especially when a defendant offers it to justify environmental damage allegedly made "necessary" by the economic costs of discontinuing a polluting activity.[80]

2. *Absence of the Requisite Mental Intent.* Ordinarily, criminal liability under German law presupposes an accused's intentional or negligent misconduct. This rule applies expressly to the major environmental provisions of the Criminal Code.[81] One acts intentionally if, knowing of the elements that constitute a given crime, one purposely fulfills those elements.[82] Negligence falls into two categories. A person is guilty of "knowing" negligence if he or she breaches a duty to refrain from conduct that he or she knows likely will result in the commission of a crime. Conversely, a person commits an act of "unknowing" negligence, if, based on the circumstances and the actor's perceptive capacity, he or she should have known that his or her conduct would result in the commission of a crime.[83]

3. *Mistake of Fact.* A person does not act criminally if he or she is unaware of a fact essential to one of the elements of the offense.[84]

4. *Mistake of Law.* This defense may apply if the defendant acts without knowing that his or her conduct violates the law, but only if this mistake is unavoidable.[85] In considering whether an accused could have avoided a particular mistake of law, the court presumes the accused's general awareness of the existence of environmental legislation.[86]

5. *Official Acquiescence.* German jurists disagree on the efficacy of the defense of official acquiescence, or *Doldung*.[87] This defense most commonly arises when an individual or business claims at trial to have proceeded under the assumption that the failure of the authorities to object to its conduct amounted to an implicit recognition that the conduct was legal.[88] The defendant more likely will succeed if an official acquiesced "actively"—that is, for example, if the permitting authority entered into an oral or written agreement with the defendant that apparently condoned an activity that otherwise would have been illegal.[89]

6. *Custom or Usage.* Under the German doctrine of *Sozialadaequenz*, a person is shielded from liability if his or her actions comport with socially approved norms of behavior, even if the acts otherwise would have been illegal.[90]

7. *Act of God.* A criminal defendant may defend on a claim that the alleged environmental violation was caused entirely by extremely harsh weather conditions, or by some other inevitable, natural occurrence that the defendant neither could prevent, nor could control.[91]

Statute of Limitations

An action for a violation of a criminal environmental provision must be brought within five years if the violation was intentional, or within three years if the violation is negligent.[92] The period begins to run when the injury

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[79] *Id.* § 34.

[80] *See, e.g.*, Judgment of Feb. 16, 1976, Landgericht (LG) Mannheim, 29 NJW 1976, 585. A *Landgericht* is a state court.

[81] StGB, *supra* note 8, §§ 324-326.

[82] Dreher & Troendle, *supra* note 34, § 15, at 101-03 .

[83] *Id.* at 106-09.

[84] StGB, *supra* note 8, § 16.

[85] *Id.* § 17.

[86] Czychowski, *supra* note 7, at 208-09.

[87] Sack, *supra* note 19, § 324, at 43-44; Dreher & Troendle, *supra* note 34, at 1712; *see also* Czychowski, *supra* note 7, at 208. *See generally* Halwass, *Rechtsmaessigkeit behoerdlich geduldeter Umweltbeeintraechtigungen?*, 9 NR 296 (1987).

[88] Sack, *supra* note 19, § 324, at 34; Dreher & Troendle, *supra* note 34, at 1712.

[89] 23 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 226, 228 (1971); Judgment of June 4, 1986, OLG Celle, 26 ZfW 126, 127 (1987); Rudolphi, *supra* note 71, at 198.

[90] Steindorf, *supra* note 13, at 55-56; BT-Drucksache, *supra* note 7, 8/2382, at 14.

[91] Wernicke, *Das Neue Wasserstrafrecht*, 30 NJW 1662, 1664 (1977).

[92] StGB, *supra* note 8, § 78.

occurs—that is, when the pollution is released into the environment.[93]

Civil Enforcement

In addition to the criminal sanctions discussed above, the government may impose a civil penalty in accordance with the civil environmental statutes. This penalty—called an administrative atonement order—may not exceed DM 100,000 for each violation.[94] Like a criminal sanction, a civil penalty cannot be imposed absent a finding that the defendant was at fault.[95]

The civil statutes also permit environmental agencies to sue for injunctive relief. Under the Federal Emission Control Act, facilities that fail to comply with statutory requirements may be ordered to discontinue their operations.[96] The Waste Disposal Act similarly empowers enforcement authorities to direct facility operators to take corrective or precautionary measures.[97]

Civil enforcement under German law is especially problematic when an organization engages in waste disposal activities, presently forbidden by the Waste Disposal Act, that it began before the Act was enacted. The German Basic Law does not permit the government to apply statutes retroactively.[98] In this situation, however, enforcement authorities still may rely on the governmental police power, which allows them to issue an abatement order if the danger posed by a disposal activity poses a substantial threat to public welfare.[99]

Private Causes of Action

A private plaintiff who wishes to bring a civil suit for environmental damages—other than damages relating to water pollution[100]—may take one of two causes of action. The first option is based on section 823 of the Civil Code. Section 823 imposes liability upon any person who intentionally or negligently injures the person or property of another.[101] The statute places no express limitation on the amount of a recovery if an injured party can establish the requisite degree of fault on the part of the defendant.[102]

The second possible cause of action derives from the Environmental Liability Act, a statute that has been in effect since January 1991. A strict liability standard applies to all private environmental actions brought under the Act,[103] but the Act also sets a liability ceiling of DM 160 million on any recovery for wrongful death, personal injury, or property damage.[104] The only available defense to a claim brought under this statute is the presence of a highly unusual natural occurrence.[105]

The Environmental Liability Act also offers an injured party some significant procedural and evidentiary advantages. For example, if a plaintiff demonstrates that the facility may have caused the injury in dispute, a rebuttable presumption arises that the facility actually caused the injury.[106]

The most severe limitation to the Environmental Liability Act is that it applies only to a few highly hazardous facilities enumerated in an appendix to the Act.[107] Because few, if any, military operations involve any of these facilities, this statute affects USAREUR only slightly.

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[93] Sack, *supra* note 19, § 324, at 98.

[94] WHG, *supra* note 11, § 41; BImSchG, *supra* note 44, § 62; AbfG, *supra* note 28, § 18.

[95] WHG, *supra* note 11, § 41; BImSchG, *supra* note 44, § 62; AbfG, *supra* note 28, § 18.

[96] BImSchG, *supra* note 44, § 20.

[97] AbfG, *supra* note 28, § 10.

[98] Badura, *Staatsrecht*, at D(51) (1986).

[99] Breuer, *"Altlasten" als Bewaehrungsprobe der polizeilichen Gefahrenabwehr und des Umweltschutzes—OVG Muenster, NVwZ 1985, 355*, 5 Juristische Schulung 359 [JuS] (1986); *see also* Schink, *Wasserrechtliche Probleme der Sanierung von Altlasten*, 101 Deutsches Verwaltungsblatt [DVBl] 161 (1986).

[100] WHG, *supra* note 11, § 22.

[101] Buergerliches Gesetzbuch [BGB], § 823.

[102] *Id.* § 249.

[103] Gesetz ueber die Umwelthaftung [UmweltHG] § 1, 1990 BGBl I 2634. For a thorough analysis of the statute, see Hager, *Das neue Umwelthaftungsgesetz*, 44 NJW 134 (1991).

[104] UmweltHG, *supra* note 103, § 15.

[105] *Id.* § 4.

[106] *Id.* § 6.

[107] *Id.* § 1.

Conclusion

For many compelling reasons, USAREUR personnel should familiarize themselves with German environmental rules. The failure to comply with these rules may subject them to criminal sanctions, civil liability, or disciplinary action under applicable Army regulations. Moreover, environmental damage decreases the residual value of USAREUR facilities, reducing the compensation that the United States may recover when it surrenders these facilities to the German authorities. Environmental damage also may give rise to claims against the United States under the NATO SOFA. Finally, by demonstrating an awareness and appreciation of host nation environmental laws, USAREUR personnel can contribute directly to the continuing friendship between USAREUR and Germany.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

To Share Is to Give: The Death of the *Swiderski* Exception in Drug Distribution Cases

A defense counsel representing an accused charged with drug distribution should not plan to defend the client with the so-called *Swiderski* exception. In *United States v. Ratleff*,[1] the Court of Military Appeals effectively put that theory to rest for purposes of military law—at least when an actual transfer of a drug has occurred.

The *Swiderski* exception, under which a person is considered not guilty of distribution if he or she merely shared a controlled substance with a copossessor, first was articulated in *United States v. Swiderski*,[2] a decision of the United States Court of Appeals for the Second Circuit. In that case, the defendant and his wife were charged with possession of cocaine with the intent to distribute after they purchased the drug from a government informant. At trial, the defense argued that the evidence was insufficient to establish that the defendant and his wife had intended to distribute the drug to a third person. Over defense objection, however, the district court judge instructed the jury that the distribution element could be satisfied solely by a transfer between the defendant and his wife.

On appeal, the defendant claimed that the district court's charge was erroneous. The Court of Appeals agreed, stating,

> [W]here two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is personal drug abuse—simple joint possession, without any intent to distribute the drug further. Since both acquire possession from the outset and neither intends to distribute the drug to a third person, neither serves as a link in the chain of distribution . . . . Their simple joint possession does not pose any of the evils which Congress sought to deter and punish through the more severe penalties provided for those engaged . . . in drug distribution.[3]

Subsequently, other circuits faced with similar fact situations painstakingly distinguished *Swiderski* to make the exception inapplicable in cases *sub judice*.[4] Before the Court of Military Appeals decided *Ratleff*, military appellate courts hinted that "the incorporation into military law of a *Swiderski*-type exception may well be appropriate in the right case,"[5] but, like

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[1] 34 M.J. 80 (C.M.A. 1992).

[2] 548 F.2d 445 (2d Cir. 1977).

[3] *Id.* at 450.

[4] *See, e.g.*, United States v. Rush, 738 F.2d 497, 514 (1st Cir. 1984); United States v. Young, 655 F.2d 624, 627 (5th Cir. 1981); United States v. Wright, 593 F.2d 105, 107-08 (9th Cir. 1979).

[5] United States v. Allen, 22 M.J. 512, 513-14 (A.C.M.R. 1986).

the federal courts, they declined to apply the exception to the particular cases at hand.[6]

The facts in *Ratleff*, however, appeared identical to the circumstances that the Second Circuit contemplated in *Swiderski*. In *Ratleff*, a friend of the accused obtained hashish and stored it in a soft-drink can in the local dining facility. Later, the accused accompanied the friend to the dining facility to retrieve the hashish. The friend took possession of the can and went with the accused to the accused's room. There, the accused opened the can, extracted the hashish, and handed it back to his friend. The two of them then shared the hashish, smoking it in an improvised pipe. The accused was charged with distributing the hashish to his friend. The military judge denied a defense motion to dismiss the specification, although he ultimately calculated the maximum punishment as that for wrongful use, rather than for distribution.[7]

On appeal, the accused contended that he and his friend had possessed the hashish jointly. He argued that, because the accused himself had not lengthened the chain of distribution, only his friend could be found guilty of distributing the drug.[8] The Court of Military Appeals disagreed. Writing for the court, Judge Cox stated, "The plain, ordinary construction of Article 112a of the Code[9] requires us to conclude that appellant 'delivered' the hashish to his friend, a fact readily admitted by appellant in his guilty pleas."[10] Thus, according to the court, the accused committed a distribution when, after briefly holding the hashish, he handed it back to his friend.

Ratleff leaves several questions unanswered. For example, the court noted that the military judge correctly "recognized that the distribution charge was based upon a technical construction of the statute and that the essence of the offenses was appellant's joint use of the drug with his fellow soldier."[11] How would the court have decided *Ratleff* if the judge had imposed a sentence that exceeded the maximum punishment for wrongful use? The court's interpretation of the term "delivered" also raises troubling issues. If Ratleff and his friend had passed the hashish back and forth among themselves several times, could the Government have charged Ratleff with a separate "distribution" for each transfer? Finally, *Ratleff*, unlike *Swiderski*, involved a conviction for actual distribution, rather than for the mere possession of drugs with the intent to distribute. The Government still may face problems of proof if it seeks to prosecute the joint purchasers of a "user" quantity of a drug on grounds that they *intended* to "distribute" the drug between themselves. Captain Wells.

Adultery Specifications Still Require the Allegation of Marriage to Another

The Court of Military Appeals, in overturning a decision of the Army Court of Military Review, reaffirmed the principle that an adultery specification must allege "that at least one of the parties is married to another person."[12] The case, *United States v. King*,[13] involved a drill instructor at Fort Lee, Virginia, who had sex with a female private first class who was attending advanced individual training. Staff Sergeant King eventually was convicted of violating a Fort Lee regulation prohibiting social relationships with trainees, wrongful sexual intercourse, and obstruction of justice[14] and was sentenced to a bad-conduct discharge.

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[6] *See generally* United States v. Bennett, 26 M.J. 173 (C.M.A. 1988) (summary disposition) (holding that when an accused collected money, purchased drugs, and distributed the drugs to members of his unit, his possession was not joint or simultaneous with that of the distributees); United States v. Tuero, 26 M.J. 106 (C.M.A. 1988) (holding that possession by coconspirators "was neither simultaneous nor exclusively for personal use" when accused's coconspirator received the drugs, turned them over to the accused for further distribution, and received a smaller portion of the cache from the accused as payment for his services); United States v. Hill, 25 M.J. 411 (C.M.A. 1988) (holding that a providence inquiry sustained the accused's guilty plea as an "aider and abettor" to distribution of marijuana when the accused admitted to providing "front money" to a person buying marijuana and stated that he personally did not partake of the drug); United States v. Figueroa, 28 M.J. 570 (N.M.C.M.R. 1989) (holding the *Swiderski* exception inapplicable when three conspirators pooled their money to purchase cocaine, which they intended to divide among themselves, because "the requisite *simultaneous* acquisition of the cocaine by *all* the conspirators" did not exist); United States v. Viser, 27 M.J. 562 (A.C.M.R. 1988) (distinguishing *Swiderski* when the accused and a friend pooled their resources and agreed to consume cocaine, but the accused went alone to the seller and purchased the cocaine on behalf of his friend).

[7] The maximum punishment for wrongful use of marijuana (including hashish) is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years. The maximum punishment for wrongful distribution increases the confinement to fifteen years. *See* Manual for Courts-Martial, United States, 1984, app. 12 [hereinafter MCM, 1984] (maximum punishment chart).

[8] *Ratleff*, 34 M.J. at 82.

[9] Uniform Code of Military Justice art. 112a, 10 U.S.C. § 912a (1988) [hereinafter UCMJ]. Article 112a provides that "[a]ny person subject to this chapter who wrongfully . . . distributes . . . a [controlled] substance . . . shall be punished as a court-martial may direct." *Id.* An accused "distributes" a controlled substance as contemplated by article 112a when he or she delivers the substance to the possession of another. *See* MCM, 1984, Part IV, para. 37c(3). "Delivery" means the actual, constructive, or attempted transfer of an item, whether or not an agency relationship exists. *Id.*

[10] *Ratleff*, 34 M.J. at 82.

[11] *Id.*

[12] United States v. King, 34 M.J. 95, 97 (C.M.A. 1992), *rev'g* 32 M.J. 588 (A.C.M.R. 1991).

[13] *Id.*

[14] *See* UCMJ arts. 92, 134.

Although the trial counsel and the military judge repeatedly referred to the specification at issue as an "adultery" specification, the specification actually alleged only that Sergeant King "did . . . wrongfully have sexual intercourse with Private First Class . . . [name], a woman not his wife."[15] After the Government rested at trial, the appellant's defense counsel moved for a finding of not guilty on several grounds—among them, that the wrongful sexual intercourse specification failed to state an offense. The defense counsel contended that the specification, as charged, failed to allege a critical element of adultery: that either Sergeant King or the trainee was married to another person.[16] The military judge disagreed, stating, "I think [the specification is] barely sufficient enough [sic] to get by and I think there's enough there to go to the jury on the issues, so I will deny the motion . . . ."[17]

On appeal, the appellant urged the Army court to follow its prior ruling in *United States v. Clifton*,[18] in which the court had held that a similar adultery specification failed to state an offense. In *Clifton*, the Army court had stated, "We disagree . . . that the phrase 'a woman not his wife,' *standing alone*, implies anything regarding the marital status of either party to the intercourse. It is as likely from the pleading that either one or both were single as it is that one was married."[19]

The Army court, however, refused to follow this rationale in *King*. Citing several cases that postdated *Clifton*,[20] it asserted that a defect in a specification is not fatal when an accused "was on notice of the offense against which he had to defend and was protected from further prosecution for the same offense."[21] The Army court reasoned that, because the defective specification contained the phrase "wrongfully [had] sexual intercourse" in addition to the words "a woman not his wife," it fairly implied that either Sergeant King or the trainee was married.[22] The court concluded that this implication had placed Sergeant King on notice that he was charged with adultery and that Sergeant King actually had defended himself against that charge. The Army court added that it found no prejudice to Sergeant King from what it termed an "inartfully drafted specification," stating that the record would protect Sergeant King from further prosecution for that particular adulterous act.[23]

The Court of Military Appeals found that the Army court had misapplied recent case law and had created the missing adultery element in a specification that actually alleged nothing more than fornication.[24] Writing for an undivided court, Judge Cox declared that the defective specification merely alleged some form of wrongful sexual intercourse without averring exactly why Sergeant King's actions were wrongful. He added, "As an allegation of 'adultery,' [the specification] lack[ed] utterly the essence of the offense—that at least one of the parties is married to another person."[25] Judge Cox then distinguished the recent decisions upon which the Army court had relied. He noted that, in each of these cases, the challenged specification had alleged definitely that the accused had committed some violation of the Uniform Code of Military Justice (UCMJ) and that despite their

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[15] *King*, 34 M.J. at 96.

[16] The elements of adultery are:

(1) That the accused wrongfully had sexual intercourse with a certain person;

(2) That, at the time, *the accused or the other person was married to someone else;* and

(3) That, under the circumstances, the conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, 1984, Part IV, para. 62*b* (emphasis added).

[17] United States v. King, 32 M.J. 588, 589 (A.C.M.R. 1991), *rev'd*, 34 M.J. 95 (C.M.A. 1992).

[18] United States v. Clifton, 11 M.J. 842 (A.C.M.R. 1981), *rev'd on other grounds*, 15 M.J. 26 (C.M.A. 1983).

[19] *King*, 32 M.J. at 589 (quoting *Clifton*, 11 M.J. at 843).

[20] *Id.* (citing United States v. Watkins, 21 M.J. 208 (C.M.A. 1986) (upholding a specification for absence without leave that failed to allege "without authority" when accused did not object to the specification at trial, providently pleaded guilty, and suffered no prejudice); United States v. Brecheen, 27 M.J. 67 (C.M.A. 1988) (applying *Watkins* to attempted drug distribution); United States v. Bryant, 30 M.J. 72 (C.M.A. 1990) (applying *Watkins* and *Brecheen* to a contested case in which the defense counsel objected to the defective specification); United States v. Bemer, 32 M.J. 570 (A.C.M.R. 1991) (applying *Bryant* when appellant contested possession of drugs with intent to distribute, but did not object to the defective specification)).

[21] *Id.*

[22] *Id.*

[23] *Id.* at 590.

[24] Fornication " 'may be defined as sexual intercourse between two unmarried persons.' " *King*, 34 M.J. at 96 (quoting 2 Wharton's Criminal Law § 217, at 361 (C. Torcia 14th ed. 1979)).

[25] *Id.* at 97 (citation omitted).

defects, these specifications had implied clearly the natures of the offenses charged.[26] In *King*, however, the specification alleged that the accused had committed "wrongful sexual intercourse"—that is, fornication—which is "not normally a crime in the military."[27] As Judge Cox noted, "Fornication was not an offense at common law *unless [it was] conducted openly and notoriously.*"[28] The common-law exception to the noncriminality of fornication can arise in a military setting when an accused's sexual relations impact adversely upon the military or its mission.[29] Accordingly, fornication conceivably could be criminal if it violated other provisions of the UCMJ—for example, UCMJ article 133 (conduct unbecoming an officer) or UCMJ article 134 (fraternization or indecent acts).

In Sergeant King's case, no factual circumstances or qualifying allegations in the "wrongful sexual intercourse" specification indicated why King's actions were "wrongful." Because the Government's goal in drafting this specification was to charge Sergeant King with adultery, "in omitting an allegation of marriage from the specification, the Government omitted the quintessential hallmark of adultery; and the specification as drafted simply [did] not state an offense."[30]

In *King* the Court of Military Appeals reversed a potentially dangerous Army court precedent. Had the court decided *King* differently, accused in courts-martial would have had to defend not only against the offenses that the Government actually charged, but also against the offenses the Government *intended* to charge. The accused, and not the Government, would have borne the burden of sloppy Government trial preparation and defective specifications.

The trial defense counsel is an accused's best hope to ensure that the Government does not benefit from its own mistakes. Defense counsel must remain alert for opportunities to exploit defective specifications and to prevent the Government from benefiting from poorly drafted charges. Captain Pope.

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[26] *Id.* (citing *Watkins*, 21 M.J. at 208; *Brecheen*, 27 M.J. at 67; *Bryant*, 30 M.J. at 72; *Berner*, 32 M.J. at 570).

[27] *Id.* at 96.

[28] *Id.*

[29] *Id.* Applying the rule from *United States v. Snyder*, Judge Cox wrote,

> Congress has not intended by Article 134 and its statutory predecessors to regulate the wholly private moral conduct of an individual. *It does not follow, however, that fornication may not be committed under such conditions of publicity or scandal as to enter that area of conduct given over to the police responsibility of the military establishment.*

Id. (quoting United States v. Snyder, 4 C.M.R. 15, 19 (C.M.A. 1952)) (emphasis added by the court).

[30] *Id.* at 97 (citations omitted). The Court of Military Appeals cited *Clifton* to support this conclusion. *See id.* (citing Clifton, 11 M.J. at 842). Accordingly, defense counsel may rely on *Clifton* as controlling precedent when determining the sufficiency of adultery specifications.

Trial Defense Service Note

Ineffective Assistance of Counsel: Practical Guidance for New Defense Counsel

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That a criminal defendant has a fundamental right to effective assistance of counsel is a well-settled principle of American law. As Justice O'Connor stated in the landmark case of *Strickland v. Washington:*

> A fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied into the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the

case of the prosecution" to which they are entitled.[1]

The Department of the Army goes to great lengths to ensure that military accused receive competent, zealous, independent representation before courts-martial. Even so, many appellants raise allegations of ineffective assistance of counsel before the Army Court of Military Review each year. Although few attorneys actually are found deficient in their performances, these allegations are unnerving and frustrating to defense counsel who work hard for their clients and who take pride in the performance of their duties.[2]

This note provides military defense counsel with guidance on ways to enhance effective representation and, when necessary, to respond to allegations of ineffective assistance. First, however, a brief review of the standard developed by the Supreme Court in *Strickland* and of the general principles courts apply to ineffective assistance cases is appropriate.

The Case of *Strickland v. Washington*

In 1984, the United States Supreme Court established a two-prong test for evaluating claims of ineffective assistance under the Sixth Amendment. The Court stated that ineffective assistance is established when the accused shows that: (1) the counsel's conduct was deficient (that is, that the counsel made errors so serious that he or she essentially failed to provide the defendant with the assistance guaranteed by the Sixth Amendment); and (2) the counsel's deficient performance prejudiced the defense.[3]

As defined in *Strickland*, deficient performance is representation that falls below an objective standard of reasonableness, based upon prevailing professional norms.[4] In adopting this broad-brush approach, the Court rejected attempts to apply specific rules or guidelines, such as those promulgated in the American Bar Association Standards for Criminal Justice.[5] Although these rules may have value as reflections of the prevailing norms, they unnecessarily limit the independence and latitude that defense counsel need to make tactical decisions. Reasonableness, therefore, must be judged by the totality of the circumstances as it exists when the counsel represents the accused.[6]

Under the *Strickland* test, deficient performance alone is not a basis for redress. The accused also must show that counsel's errors deprived the accused of a fair trial, so that the resulting conviction or sentence determination is unreliable.[7]

Since its publication, the *Strickland* standard has been applied in a number of different adversarial proceedings. These include criminal appeals,[8] federal habeas corpus hearings,[9] and trials by courts-martial.[10]

General Principles

Trial defense counsel must be familiar with a number of general principles that derive from *Strickland* and its progeny. First, an accused may raise a claim of ineffective assistance at any stage in the proceedings, from pretrial preparation through posttrial submissions.[11] Second, the accused normally bears the burden of proof to satisfy both prongs of the *Strickland* test. To prevail, he or she must show the existence of a reasonable probability that, but for your unprofessional errors, the proceeding would have resulted differently. In this context, the Supreme Court defines reasonable probability as probability sufficient to undermine confidence in the outcome

[1] Strickland v. Washington, 466 U.S. 668, 690 (1984)

[2] Neither the Defense Appellate Division, nor the Government Appellate Division (GAD), maintains statistics on the number of allegations of ineffective assistance of counsel that are raised each year. The numbers, however, are significant enough that one distinct branch of GAD bears primary responsibility for responding to ineffective assistance claims filed by appellants.

[3] *Strickland*, 466 U.S. at 687.

[4] *Id.* at 688.

[5] *Id.*

[6] *Id.* at 690.

[7] *Id.* at 685.

[8] Evitts v. Lucey, 105 S. Ct. 830 (1985).

[9] Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988).

[10] United States v. Wattenburger, 21 M.J. 41 (C.M.A. 1985).

[11] A sampling of the military cases in which counsel have been cited for defective performance include: United States v. Scott, 24 M.J. 186 (C.M.A. 1987) (failure to conduct adequate pretrial investigation); United States v. Merriweather, 22 M.J. 687 (A.C.M.R. 1986) (failure to object to uncharged misconduct brought out by the Government); United States v. Jackson, 18 M.J. 753 (A.C.M.R. 1984) (failure to raise the statute of limitations as a bar to trial); and United States v. Black, 16 M.J. 507 (A.F.C.M.R. 1983) (failure to rebut statements that are misleading, incomplete, or erroneous in the SJA's posturial review).

of the proceeding.[12] The prejudice prong of the test is presumed, however, if the Government has hindered your assistance of the accused or if an actual conflict of interest adversely affected your performance.[13] Third, a strong presumption attaches that you have rendered adequate assistance and that you used reasonable professional judgement in making significant decisions.[14] The *Strickland* court recognized both the difficulty and the danger of appellate courts "second guessing" a defense attorney's actions. As a defense counsel, you face a wide range of options and approaches in conducting any given case. The presumption gives you great latitude in choosing an appropriate strategy without the chilling suspicion that an appellate court later may substitute its judgment for your own. In practice, an accused will not prevail on a claim of ineffective assistance against you if the action or inaction of which the accused complains was based on a reasonable trial strategy.

Closely related to the presumption of effective assistance is the principle that a lack of success at trial does not equate to ineffective assistance. Deficient performance is determined by an objective application of professional norms to the particular facts and circumstances under which you made your decisions.[15] The result that obtains from these choices is not relevant to an inquiry into the adequacy of your performance. When deficient performance is found, however, the particular result that flows from your performance is important in deciding the issue of prejudice.[16] The worse the result, the more likely that prejudice will be found.

Finally, by claiming ineffective assistance, the defendant waives attorney-client privilege as to that issue.[17] This waiver allows you to submit otherwise confidential information to the appellate courts— usually in affidavit form. The waiver, however, extends only to information necessary to explain or to rebut the circumstances relating to the allegation of ineffective assistance. You still owe a duty of loyalty to your client. By disclosing unrelated confidential information or otherwise working against the client's interests, you breach that duty.

Conflicts of Interest

Probably no issue in the area of ineffective assistance of counsel has received more scrutiny than conflicts of interest. Conflicts generally surface in two situations. The first may arise if you enter attorney-client relationships with the accused and another interested party. The other party could be a coaccused,[18] a Government witness,[19] or some other person with a vested interest in the proceedings. The second situation may occur if you are committed personally to some cause that is adverse to a client's interests.[20] In either case, prejudice to the client is presumed upon a showing that: (1) you actively represented conflicting interests; and (2) an actual conflict adversely affected your performance.[21]

The application of this test does not foreclose all possibility of multiple representations. Nevertheless, you should avoid multiple representation whenever possible. Army policy provides that a defense counsel will not undertake or be detailed to represent more than one client in a multiple accused situation.[22] If you believe that you inadvertently have committed yourself to conflicting interests, report this conclusion to your senior defense counsel.[23] Normally, you will be released from the case and another counsel will be detailed.

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[12] *Strickland*, 466 U.S. at 694; *see also* United States v. Bono, 26 M.J. 240 (C.M.A. 1988) (per curiam).

[13] *Strickland*, 466 U.S. at 692; *see also* United States v. Cronic, 466 U.S. 648, 657 (1984); Cuyler v. Sullivan, 446 U.S. 335, 344 (1980).

[14] *Strickland*, 466 U.S. at 690.

[15] United States v. Mansfield, 24 M.J. 611 (A.F.C.M.R. 1987).

[16] *Bono*, 26 M.J. at 242. In *Bono*, the defense counsel failed to object to uncharged misconduct mentioned in defendant's confession and later put into evidence a mental status report that contained other evidence of the defendant's misconduct and recalcitrance. After trial, the military judge told the defense counsel that he had more than doubled the sentence after reviewing the confession. *Id.* at 241. The Court of Military Appeals found that the counsel's performance was deficient under the first prong of *Strickland*, then concluded that resulting enhanced punishment clearly evidenced prejudice. *Id.* at 242-43.

[17] United States v. Dupas, 14 M.J. 28 (C.M.A. 1982).

[18] United States v. Blakey, 1 M.J. 247 (C.M.A. 1976).

[19] United States v. Newak, 15 M.J. 541 (A.F.C.M.R. 1982).

[20] *See, e.g.*, United States v. Kidwell, 20 M.J. 1020 (A.C.M.R. 1985). In *Kidwell*, the accused agreed to act as a government informant in return for a favorable recommendation for a discharge in lieu of court-martial. The accused's civilian defense counsel failed to submit a timely discharge request because he felt that the information his client would produce was so valuable to society that his client's interests were insignificant in comparison. *Id.* at 1022.

[21] *Strickland*, 466 U.S. at 2067.

[22] U.S. Army Trial Defense Service, Standard Operating Procedure, Defense Counsel, para. 3-3 (1 Oct. 1985) [hereinafter Standard Operating Procedure].

[23] *Id.*, para. 3-4.

Under some circumstances, two clients with conflicting interests may not want to release you. You then must advise each client of the ramifications of your continued representation. If each knowingly and intelligently waives his or her Sixth Amendment protection, you may continue to represent both of them.[24] You should document all waivers carefully and should notify the military judge of the general nature of the conflict to ensure that an inquiry is made on the record.

Enhancing Counsel Effectiveness

As the Court stated in *Strickland*, the purpose of the Sixth Amendment simply is to ensure that a criminal defendant receives a fair trial—not to improve the quality of the defendant's legal representation.[25] Although that may be true, the best defense to an accused's ineffective assistance claim is to show that you represented the accused skillfully throughout the proceedings. To represent an accused effectively can be a real challenge—especially for a new defense counsel. This challenge, however, is not insurmountable. Through careful preparation and attention to detail, you significantly can improve the assistance you render to your clients.

Before you ever talk to your first client, you must understand the breadth of your duties. The responsibilities of a military defense counsel are set forth in Rule for Courts-Martial 502(d)(6).[26] You should read this provision, along with the Rules of Professional Conduct for Lawyers,[27] the Trial Defense Service Standard Operating Procedure,[28] local rules of court, and the *Trial Counsel and Defense Counsel Handbook*.[29] These materials form your "basic load." They not only define the ethical and professional parameters of your duties, but also provide you with valuable guidance in organizing materials, establishing priorities, and advocating positions.

To ensure that you overlook no duty or material issue, use a checklist that encompasses your major responsibilities. A sample checklist is printed as the appendix to this note. Other useful checklists covering motions, hearings, and instructions can be found in the *Trial and Defense Counsel Handbook and the Military Judges' Benchbook*.[30]

The key to providing truly effective assistance is to develop a single, coherent theory of the case that is supported by the facts and the applicable law. In this context, the theory of the case is a strategic plan that is designed to achieve a particular goal or outcome.

The first step in adopting a theory of the case is to investigate the facts thoroughly, including the backgrounds and characters of the accused and the key witnesses. After reviewing all the facts, you can identify the options reasonably available to your client. The range of options may run anywhere from reasonable doubt and insufficiency of proof to various affirmative defenses. In many instances, an accused's most viable option will be to concentrate on obtaining the best possible sentence by means of a plea agreement.

You can select the best theory from the potential options through a process of "wargaming." Wargaming is nothing more than visualizing what is likely to occur at each stage of the proceedings, depending on the option you have selected. You must anticipate what the Government's proof will be, what admissible evidence will be available to support the option, how the opposing counsel will react to that evidence, and what legal issues may be raised. Part of this process includes researching potential motions, objections, evidentiary foundations, and instructions that could affect the success of each option.

Before settling on a theory, you should discuss the facts and available options with your senior or regional defense counsel. They may see issues or strategic approaches that you have not considered. Moreover, when a final theory is formulated, they can provide important advice on the best tactics to use in presenting the theory.

Before you walk into court, you should have a detailed mental picture of what is going to happen. Each stage in the proceedings, from pretrial motions to final argument on sentence, should be outlined. All your presentations should be rehearsed. Although you cannot anticipate every eventuality, you can keep surprises in court to a minimum through thorough preparation. Most importantly, your preparation and execution of all aspects of the case, including your responses to surprises, must support the strategic theory you have

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[24] *See, e.g.*, United States v. Garcia, 517 F.2d 272 (5th Cir. 1975); United States v. Piggee, 2 M.J. 462 (A.C.M.R. 1975).

[25] *Strickland*, 466 U.S. at 689.

[26] Manual for Courts-Martial, Rule for Courts-Martial 502(d)(6) [hereinafter R.C.M.].

[27] Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers (31 Dec. 1987).

[28] *See generally* Standard Operating Procedure, *supra* note 22.

[29] Criminal Law Division, The Judge Advocate General's School, U.S. Army, JA 310, Trial Counsel and Defense Counsel Handbook (May 1991).

[30] Dep't of Army, Pam. 27-9, Military Judges' Benchbook (15 May 1989).

adopted. This consistency will enhance the credibility of the theory with the factfinder and will increase your chances of success.

Attorney-Client Communication

Every year, scores of disgruntled clients raise claims of ineffective assistance, alleging that they were pressured unfairly into making a particular decision or that their attorneys deliberately worked against their interests. Although these claims rarely are substantiated, they do indicate, at a minimum, communications breakdowns between the attorneys and their clients.

Defense counsel are responsible for consulting with their clients on important decisions and for keeping the clients informed of major developments in the course of their prosecutions.[31] In military practice, each accused must make specific elections about representation, pleas, court-martial composition, and the assertion of defenses. The accused also must decide whether to testify or to remain silent.[32] An accused can make these elections only if he or she fully understands their meanings and effects.

Unfortunately, a number of factors can distort communications between an attorney and a client. An attorney may use language or semantics that the client does not understand. The client may hear only what he or she wants to hear and may "block out" unpalatable information. Alternatively, the client may suffer information overload—that is, receiving too much information too fast to comprehend what is being said.

You must be aware of distortion problems and must develop techniques to deal with them. The tenor of the communication process is established at the first meeting. The length and the subject matter of initial meetings may vary from client to client, but in every case your goal must be to promote an open and candid dialogue. Address your client's questions and concerns fully and frankly; never trivialize them. Without alarming your client unnecessarily, give him or her a realistic assessment of the case. Finally, establish from the beginning that you are there to help the client and that you will do everything ethically possible to protect his or her interests. Emphasize that, in return, your client must be truthful with you and must not "hide" information from you that concerns the case.

Open lines of communication require nurturing. A client should be made to feel that he or she is a player in the court-martial process, not just the object of it. You can build client confidence and can promote communication by returning your client's phone calls promptly, by keeping the client informed of the case status, and by discussing with the client your theory of the case and your trial strategy. This is not to say that you should defer to the client's judgment on these matters. Unless a decision is reserved to the client's discretion,[33] *you* must determine which tactics are proper in each case. If your client disagrees with you, or if you have adopted a controversial trial strategy, you should set down the facts and the basis for your decision in a memorandum for record. Whenever possible, you also should have your client countersign the memorandum.

Research has shown that in oral communications as much as seventy-five percent of a message is misinterpreted or forgotten.[34] You can promote better understanding and can reduce selective perception by using appropriate language and by employing the techniques of feedback, repetition, and parallel communications.

The first rule here is to speak at the education and experience levels of your client. Few clients can sort out the meanings behind Latin phrases or pompous legal jargon. Explain court-martial procedures, legal issues, and technical terms simply and clearly.

Use feedback to assess how a client actually interprets a particular message. You can do this by soliciting questions or by asking the client to explain in his or her own words a topic that you previously discussed. Remember, feedback is a two-way process. When you discover that your client misunderstood your message, you must take the time to correct the misunderstanding before the incorrect message becomes fixed in the client's mind.

Repeating a message, particularly through parallel modes of communication, enhances understanding.[35] You can apply this technique by reinforcing important oral discussions with some form of written communication, such as a memorandum, a client information paper, or an election form. When you use an election form, you should outline the client's possible options clearly and should emphasize that the election decision is solely within the client's discretion. Finally, you should provide the client with copies of motions, briefs, and other pertinent trial documents. This not only

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[31] *Strickland*, 466 U.S. at 688.

[32] R.C.M. 502(d)(6).

[33] *See supra* notes 31-32 and accompanying text.

[34] L. Donaldson & E. Scannell, Human Resource Development: The New Trainer's Guide 65 (1985).

[35] A. Szilagyi & M. Wallace, Organizational Behavior and Performance 502 (1990).

keeps the client informed on the status of the case, but also showcases your continued efforts on the client's behalf.

Responding to Allegations

Normally, an ineffective assistance allegation first is raised when a case is appealed to the Army Court of Military Review. Claims are made by the client or by an appellate defense counsel who "discovers" a serious error on the record.[36] Often, appellate defense counsel will contact you about the claim and will request a response. In some cases, however, you first will learn of a claim from a Government appellate counsel who is trying to respond to an allegation in a filed brief.

In either case, your best option usually is to submit an affidavit. Although you may feel more aligned with the Government appellate counsel in this process, that attorney does not represent you and cannot advise you.[37] Moreover, a claim of ineffective assistance does not sever the overall attorney-client relationship or end your continuing duty to cooperate in the appeal.[38]

Immediately after you receive notice of a claim, you should inform your senior and regional defense counsel of the allegation. They can help you to obtain necessary records or documents and will review your final affidavit to ensure that it is not unnecessarily broad and that it contains no confidential information that has not been waived by the claim.

Before you respond, you should request a written statement of the allegation and all documents supporting it, including any defense briefs or affidavits submitted by the client or by anyone else. Next, review pertinent parts of the record of trial, your trial notebook, and any documentation you prepared on the case. In every case you work, you normally should keep notes, chronologies, memoranda, and allied papers readily accessible until all appeals have been resolved.

Once you have reviewed the specific allegation and have refreshed your recollection of the case, you are ready to write your affidavit. The content of the affidavit will depend on the claim. The more sweeping the allegation of ineffective assistance, the more leeway you have in responding. Nevertheless, you must be careful not to overreact. Your response should be limited to answering the allegation. Disclosing a confidential communication or information harmful to the client is improper if this data is extraneous to the claim.[39]

In general, an adequate response sets out the facts as you knew them at the relevant time, and explains how you considered those facts when you decided to act, or to refrain from acting. Often, you will need to do little more than explain how the questioned action tactically supported your theory of the case. If possible, attach memoranda, trial notes, or other documents that support your position if these do not constitute improper disclosures.

Conclusion

Truth best is discovered by powerful statements on both sides of the question.[40] That pronouncement by Lord Eldon forms the basis of the military's adversarial justice system. Claims of ineffective assistance attack not only the performance of an individual trial defense counsel, but also the integrity of our system of justice.

As a trial defense counsel, you are responsible for providing competent and professional representation on behalf of your clients. To do this, you must understand fully the nature and the extent of your duties. You must be sensitive to conflicts, must be meticulous in your preparations, and must employ tactics that support a rational theory of the case. Finally, you must communicate effectively with the client.

Because a claim of ineffective assistance can be raised at any time, you also must take steps to protect yourself. Whenever possible, you should document your thought processes and your work efforts. Particular care should be taken to memorialize disagreements with clients and actions that may appear controversial. Most important, when doubts or concerns arise, you should discuss them with your supervisor and should draw on the wealth of experience that the Trial Defense Service has to offer.

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[36] See Hancock, *Ineffective Assistance of Counsel: An Overview*, The Army Lawyer, April 1986, at 41, for a more complete description on how claims are processed on appeal.

[37] United States v. Dupas, 14 M.J. 28, 32 (C.M.A. 1982).

[38] *Id.* at 33.

[39] Assume, for example, that a client alleges that his trial defense counsel failed to interview five character witnesses. A sufficient response would state that the allegation is incorrect, indicating the dates the interviews were conducted and stating that no helpful information was obtained. Adding that the client is not credible because he repeatedly lied to the defense counsel or detailing the many terrible things these witnesses said about the client would be unnecessary and an abrogation of the counsel's duty of loyalty.

[40] Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A. J. 569, 569 (1975) (quoting Lord Eldon).

Appendix

Checklist for Trial Defense Counsel

Duties Before Trial

____ 1. Log case/start trial notebook.

____ 2. Determine "day one" for speedy trial computation (R.C.M. 707).

____ 3. Document any delays in writing.

____ 4. Examine the charge sheet and allied papers for:

- ____ a. Completeness
- ____ b. Defective specifications
- ____ c. Multiplicity/duplicity/ambiguity
- ____ d. Statute of limitations
- ____ e. Conflicts

____ 5. Interview the client

- ____ a. Attorney-client relationship/privilege
- ____ b. Conflicts of interest
- ____ c. Allegations and Government evidence
- ____ d. Court-martial process
- ____ e. Maximum possible punishment
- ____ f. Obtain facts/list of witnesses
- ____ g. Restraint
- ____ h. Client's personal history/family situation
- ____ i. Client's conduct pending trial
- ____ j. Decisions to be made by client

  - ____ (1) Choice of counsel
  - ____ (2) Court composition
  - ____ (3) Challenges
  - ____ (4) Pleas
  - ____ (5) Testimony
  - ____ (6) Stipulations
  - ____ (7) Assertion of defenses
  - ____ (8) Sentencing evidence

____ 6. Notify TC/CID/MPI of representation.

____ 7. Monitor pretrial publicity/consider venue motion.

____ 8. Determine the availability of witnesses/obtain depositions or interrogatories, as needed.

____ 9. Interview witnesses/obtain depositions or interrogatories, as needed.

____ 10. Prepare proof analysis sheet listing the elements of each charged offense and of lesser included offenses and the evidence available to support or to refute these elements.

____ 11. Identify weaknesses in the Government's case.

____ 12. Identify potential affirmative defenses.

____ 13. Develope possible theories of the case.

____ 14. Draft written discovery requests.

____ 15. Consider sanity/fitness issues/need for a board.

____ 16. Represent the client at the article 32 hearing.

- ____ a. Advise the client of his or her rights (R.C.M. 405).
- ____ b. Consider benefits of a waiver.
- ____ c. Request witnesses/documents.
- ____ d. Request preservation of tapes/notes/transcripts.
- ____ e. Examine witnesses.
- ____ f. Review report and make objections (R.C.M. 405)

____ 17. Examine sites/real evidence.

____ 18. Request independent testing/expert assistance.

____ 19. Investigate client's character (truthfulness, good soldier qualities, and traits pertinent to the offenses charged).

____ 20. Review client's personnel/medical files.

____ 21. Obtain authenticated copies of favorable information.

____ 22. Investigate the character of each key witness.

____ 23. Explore alternative dispositions with your client and the command.

- ____ a. Dismissal of charges.
- ____ b. Article 15/administrative sanction
- ____ c. Discharge in lieu of court-martial.
- ____ d. Negotiated plea to offense or to lesser included offense.
- ____ e. Contest.

____ 24. Determine motions/writs/provide notice.

____ 25. Develop theory of the case and wargame trial possibilities.

____ 26. Anticipate evidentiary issues and objections.

____ 27. Outline direct examination.

____ 28. Outline cross-examination.

____ 29. Outline opening statement.

___ 30. Outline closing argument.

___ 31. Prepare demonstrative evidence.

___ a. Photographs/videos.
___ b. Charts.
___ c. Diagrams.
___ d. Maps.
___ e. Demonstrations.

___ 32. Prepare real and documentary evidence.

___ a. Foundation.
___ b. Authentication.
___ c. Stipulation.
___ d. Mark evidence.

___ 33. Prepare the client.

___ a. Finalize plea/forum/prepare necessary documents.
___ b. Explain theory of the case/trial procedure.
___ c. Prepare testimony.
___ d. If client decides to plead guilty, conduct a mock providence inquiry.
___ e. Obtain client's consent to any stipulation.
___ f. Advise client of appellate rights/client signs.
___ g. Advise client of right to request deferral of confinement.
___ h. Emphasize the importance of the client's appearance and conduct in court.

___ 34. Review member questionnaire/prepare *voir dire*.

___ 35. Prepare requests for instructions.

___ 36. Prepare requests for special findings.

___ 37. Outline sentencing argument.

___ 38. Notify TC of plea/forum/intent to offer defense of alibi, innocent ingestion, or lack of mental responsibility.

___ 39. Submit witness list.

Duties During Trial

___ 40. Represent client zealously.

___ 41. Assert all applicable motions/objections.

___ 42. Adjust arguments to comport with facts in evidence.

___ 43. Ensure that client fully understands proceedings.

Duties After Trial

___ 44. If client is found guilty, advise client.

___ a. Appellate rights/article 69/sign election.
___ b. Effect of sentence.
___ c. Clemency/early release/rehabilitation opportunities.

___ 45. Prepare clemency petition (R.C.M. 1105).

___ 46. Review record of trial.

___ 47. Review/rebut SJA's posttrial review (R.C.M. 1106).

___ 48. Prepare article 38c brief/article 69 petition.

___ 49. Cooperate fully with appellate defense counsel.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Contingent Confinement and the Accused's Counter-Offer

Rule for Courts-Martial (R.C.M.) 1003(b)(3)[1] authorizes courts-martial to adjudge fines as punishments. The discussion to R.C.M. 1003(b)(3), however, "caution[s]" that "[a] fine normally should not be adjudged against a member of the armed forces unless the accused was unjustly enriched as a result of the offense of which convicted."[2] At a special or summary court-martial, a fine, if adjudged, may substitute for

[1] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1003(b)(3) [hereinafter R.C.M.].

[2] R.C.M. 1003(b)(3) discussion. *But see* United States v. Williams, 18 M.J. 186 (C.M.A. 1984) (provision that fines "normally [are] for unjust enrichment" is directory, rather than mandatory).

a forfeiture, but it may not exceed the amount the court-martial could adjudge for the forfeiture.[3] At a general court-martial, the amount of a fine is not controlled so tightly; however, a fine may not be so severe that it constitutes cruel or unusual punishment.[4]

To motivate payment of an adjudged fine, the Manual for Courts-Martial allows a court-martial to adjudge contingent confinement. Rule for Courts-Martial 1003(b)(3) provides:

> [T]o enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired.[5]

Rule for Courts-Martial 1113(d)(3) protects from contingent confinement an accused who cannot pay a fine because of a lack of funds. This rule states,

> Confinement may not be executed for failure to pay a fine if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigence, unless the authority considering the imposition of confinement determines, after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the Government's interest in appropriate punishment.

Although this rule attempts to ensure constitutional protections to an accused,[6] it fails to establish specific procedures that the government should use to convert an unpaid fine into confinement. The military appellate courts have attempted to fill this void. In *United States v. Rascoe*[7] the Navy-Marine Corps Court of Military Review outlined procedures and criteria[8] that convening authorities should use when making this determination. A recent Army case, decided by the United States Court of Military Appeals, has added another layer of protection for accused with adjudged contingent confinements.

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[3] For example, a special court-martial may adjudge a forfeiture of two-thirds of an accused's pay per month for six months. If an accused is reduced to private (E-1), the accused's pay would be $900 per month until his or her discharge is executed. Accordingly, a special court-martial's jurisdictional limit for forfeitures would be $600 per month for six months, or a total of $3600. Therefore, the maximum permissible fine the special court-martial could adjudge would be $3600. Moreover, because a special court-martial may impose a fine only as a substitute for forfeiture, it could adjudge no forfeitures in addition to the $3600 fine.

[4] U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"); *see also* Uniform Code of Military Justice art. 55, 10 U.S.C. § 855 [hereinafter UCMJ]. Article 55 provides expressly,

> Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

UCMJ art. 55; *see also Williams*, 18 M.J. at 186. In *Williams*, the Court of Military Appeals found no financial limits on the fine a general court-martial may adjudge, other than the constitutional and statutory proscriptions of cruel and unusual punishment. The court, however, emphasized that

> unless the pretrial agreement specifically mentions the possibility of a fine or other evidence [suggests] that the accused was aware that a fine could be imposed, a general court-martial may not include a fine in addition to total forfeitures in a guilty plea case unless the possibility of a fine has been made known to the accused during the providence inquiry.

Id. at 189.

[5] R.C.M. 1003(b)(3). One caveat to contingent confinement is that the total period of confinement served by the accused may not exceed the jurisdictional limit of the court-martial. *Id.*

An unsettled issue in the area of contingent confinement is whether the originally adjudged sentence must include confinement onto which the contingent confinement is "added." The service courts of review are split on this issue.

In United States v. Shada, 28 M.J. 684 (A.F.C.M.R. 1989), the Air Force Court of Military Review held that an accused who is not sentenced to confinement cannot receive a sentence that includes conditional confinement if he or she fails to pay a fine. On the other hand, in United States v. Bevins, 30 M.J. 1149 (A.C.M.R. 1990), the Army Court of Military Review held that a fine and contingent confinement may be imposed even though the sentence does not otherwise provide for confinement. More recently, in United States v. Tuggle, 34 M.J. 89 (C.M.A. 1992), the Court of Military Appeals declined to address the issue.

[6] *See* R.C.M. 1113(d)(3) analysis, app. 21, at A21-76.

[7] 31 M.J. 544 (N.M.C.M.R. 1990). The court held that contingent confinement for failure to pay a fine cannot be converted to confinement unless the convening authority first determines whether the accused failed to pay willfully, or failed to pay because of indigence. *See id.* at 556-59 (forbidding arbitrary transformation of a fine enforcement provision into punishment); *see also id.* at 563 (listing the criteria the convening authority should consider in making this determination). The convening authority may order the accused confined if the accused willfully refused to pay the fine. *See id.* at 557. If the accused failed to pay because of indigence, however, the convening authority may convert the conditional confinement to confinement only if no other alternative to confinement will satisfy the penal interests of the government. *Id.* at 557-58.

[8] Determining that it properly could "consider the federal criteria," the court adopted provisions of 18 U.S.C. §§ 3572, 3614 (1988) as guidance. *Id.* at 563; *see also infra* text accompanying notes 48-50 (describing the criteria the court adopted). The court also declared that it will use two additional criteria when determining if a transformation action was appropriate:

a. Whether the accused willfully refused to pay the fine or had failed to make sufficient bona fide efforts to pay the fine; and

b. Whether, looking at the crime and the accused, alternatives to imprisonment "are not adequate to serve the purposes of punishment and deterrence."

Rascoe, 31 M.J. at 563.

Good-Faith Efforts and True Indigence:

United States v. Tuggle[9]

Sergeant First Class Edward M. Tuggle pleaded guilty to one specification of making a false official statement and to two specifications of larceny of military property valued at more than $8000.[10] The military judge sentenced him to pay a fine of $10,000 and to be reduced to the rank of specialist. The sentence also included a provision that, if the fine imposed remained unpaid thirty days after action, Tuggle would receive one year's contingent confinement and would be reduced to private (E-1).[11]

On 3 November 1989, the convening authority approved the sentence as adjudged, including the provision for contingent confinement. Thirty days later, on 3 December 1989, the accused had not paid the fine.[12] On 4 December, the convening authority began the process of determining whether the accused had "made good-faith efforts to pay the fine, but could not"[13] do so because of indigence. The convening authority appointed the chief of criminal law for the Fifth Infantry Division as "military magistrate."[14] On 4 December, the staff judge advocate provided the accused with a memorandum notifying the accused that the fine had to be paid by 4 December, that the convening authority had appointed a military magistrate, and that a hearing had been scheduled. The memorandum also stated that Tuggle could present evidence at the hearing that he had attempted in good faith to pay the fine, but had lacked the assets to do so.[15]

On 6 December, the military magistrate conducted the hearing. Tuggle appeared with his defense counsel. The military magistrate advised Tuggle of his rights. Tuggle presented evidence, testified, and was cross-examined. The military magistrate then concluded in his "findings and recommendations"[16] that Tuggle was not indigent and that, although Tuggle had made "reasonable efforts"[17] to obtain a loan, he had not made "a good-faith effort to meet his court-ordered obligation."[18]

On 12 December, Tuggle, through his defense counsel, asked the convening authority to allow him to pay the fine in monthly forfeitures, or in installments, as a "reasonable alternative punishment to the sentence of confinement for a year and reduction to E-1."[19] Nevertheless, on 13 December, the convening authority "implicitly adopted"[20] the findings of the magistrate and ordered execution of the one-year confinement and the reduction to private.

The Army Court of Military Review affirmed the convening authority's execution of the contingent confinement for

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[9] 34 M.J. 89 (C.M.A. 1992).

[10] *See* UCMJ arts. 107, 121.

[11] Judge Cox recognized that the Army Court of Military Review had questioned in passing the propriety of a "contingent reduction to E-1." *Tuggle*, 34 M.J. at 90 n.3. He noted, however that the Army court had resolved this dilemma "aptly" by ruling that the confinement and the automatic "administrative reduction" provisions of UCMJ article 58a had rendered the issue moot. *See id.* (citing United States v. Tuggle, 31 M.J. 778, 781 (A.C.M.R. 1990), *rev'd on other grounds*, 34 M.J. 89 (C.M.A. 1992)).

The Army court, however, may not have resolved this issue correctly. Reduction under R.C.M. 1003 is an adjudged punishment. *See* R.C.M. 1003(b)(5). "Reduction under Article 58a [, however,] is not part of the sentence, but is an administrative result thereof." R.C.M. 1003(b) discussion. Accordingly, a military judge cannot adjudge a reduction that is the administrative consequence of another adjudged punishment, such as confinement, hard labor without confinement, or a punitive discharge.

This issue could not arise if every military appellate court followed the plain meaning of R.C.M. 1003(b)(3). The rule clearly requires an initial period of adjudged confinement to which contingent confinement is added. *See id.* (expressly providing that, if a "fine is not paid, the person fined shall, *in addition to* any period of confinement adjudged, be further confined") (emphasis added). If an accused is confined initially, he or she will be reduced administratively to private (E-1). See UCMJ art. 58a. If the accused *then* receives *additional* confinement for failing to pay a fine, the accused already will have been reduced. *See id.* Therefore, the accused's reduction would not be contingent on his or her nonpayment of the fine. *See supra* note 5.

[12] *Tuggle*, 34 M.J. at 90.

[13] R.C.M. 1113(d)(3); *Tuggle*, 34 M.J. at 90.

[14] Judge Cox expressly questioned the propriety of this appointment, suggesting that the demands of the "magistrate's" primary duty position as chief of criminal law virtually precluded him from rendering an impartial decision. *Tuggle*, 34 M.J. at 90 n.1. Chief Judge Sullivan also questioned this officer's qualifications to act as "a sentencing court," stating flatly that, had he written the majority opinion, he would have found plain error. *See id.* at 94 (Sullivan, C.J., concurring) (citing Bearden v. Georgia, 461 U.S. 660, 672 (1983)).

[15] *Id.* at 90. The court noted that this was the first time that the government notified the accused that "should he be unable to accumulate the entire amount of the fine, 'a good faith effort' on his part would be viewed favorably by the convening authority." *Id.* at 93.

[16] *Id.* The court included this undated document as an appendix to the opinion. *See id.* at 93-94.

[17] *Id.* at 90.

[18] *Id.*

[19] *Id.*

[20] *Id.* By using the word "implicit," the Court of Military Appeals implied that a convening authority should state explicitly whether the convening authority has adopted or has rejected the military magistrate's findings and recommendations.

nonpayment of the fine.[21] It held that the findings and recommendations of the magistrate and the action by the convening authority were "discretionary decisions," subject only to review for "abuse of discretion."[22] Having adopted this standard, the court "agreed"[23] with the magistrate's findings that the accused was not indigent and that the accused reasonably could have raised the $10,000. The Army court noted specifically that the accused could have surrendered his three-month-old Chrysler LeBaron convertible; could have suspended temporarily his "voluntary" payments for child support and support of his mother; could have cancelled his life insurance policy, which had a cash value of at least $837; could have cancelled his life insurance allotments; could have cancelled his bond allotment; and could have asked his mother to take out a second mortgage on her house and loan him $6000.[24] Because it agreed with the magistrate that Tuggle had not made a bona fide effort to pay the fine, the court concluded that it did not have to determine whether Tuggle's request to pay the fine in installments was an "adequate alternative method of punishment."[25]

The United States Court of Military Appeals reversed the Army court. The Court of Military Appeals began its analysis by recognizing that R.C.M. 1113(d)(3) protects an accused who cannot pay a fine because of indigence.[26] The court then considered whether Tuggle truly was indigent and whether any alternative punishments would have been adequate to satisfy the government's penal interests.

The Court of Military Appeals analyzed *the facts*[27] found by the Army court and concluded that:

- Tuggle's entire salary from the date of sentence until action was insufficient to pay the fine.[28]
- The sale of Tuggle's recently purchased Chrysler LeBaron convertible would not have produced sufficient funds to pay the fine and actually would have increased Tuggle's overall indebtedness.[29]
- The record did not support the Army court's conclusion that Tuggle's support payments to his minor children and his mother were "voluntary."[30]
- A soldier's family members have no duty to mortgage their homes to satisfy a fine adjudged against the soldier.[31]

From these factual findings, the court noted that "*a strong argument could be made* that Tuggle did not have sufficient liquid assets to pay the fine."[32]

Next, the court declared that, although "it [was] reasonable to expect that Tuggle would use all available assets to pay the fine . . . it [was] clear from the sentence, the Government's actions, and Tuggle's actions, that [Tuggle] thought the fine was an all or nothing proposition."[33] The court evidently concluded that this finding excused Tuggle from offering any partial payment on the $10,000 fine as a good-faith effort to pay the fine.

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[21] United States v. Tuggle, 31 M.J. 778 (A.C.M.R. 1990), *rev'd*, 34 M.J. 89 (C.M.A. 1992).

[22] *Id.* at 780.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 781; *see also* R.C.M. 1113(d)(3).

[26] *Tuggle*, 34 M.J. at 91; *see also* Bearden v. Georgia, 461 U.S. 660 (1983); Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).

[27] The Army Court of Military Review held that the magistrate's findings and recommendations were discretionary decisions, subject to review for abuse of discretion. The Army court's review comported with UCMJ article 66. *See generally* UCMJ art. 66(c) (establishing standards of review for the courts of military review). The Court of Military Appeals apparently performed a similar factual review, even though its standard of review is limited by statute to "matters of law." *See* UCMJ art. 67(c).

[28] From sentence until action, Tuggle continued to receive pay at the rate of a sergeant first class. *See generally* R.C.M. 1113(a).

[29] The court noted that, although Tuggle still owed over $23,000 on the car, it had a market value of only $19,000. *Tuggle*, 34 M.J. at 92. Consequently, it concluded that selling the automobile might have reduced Tuggle's immediate debt, but would not have produced any funds for the fine. *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* (emphasis added). This is an incorrect standard for appellate review by the Court of Military Appeals. *See* UCMJ art. 67(c); *see also supra* note 27. Apparently, this "holding" allowed the court to bypass the first test of R.C.M. 1113(d)(3)—*that is, determining* whether the accused was indigent and whether he had attempted in good faith to pay the fine.

[33] The logic supporting the court's conclusion is questionable. If Tuggle truly thought that paying the fine was "an all or nothing proposition," why did he propose to pay the fine in monthly forfeitures or installments? Common sense suggests that this offer to make an initial partial payment evinced the accused's "good-faith" effort to pay the fine.

The court then stated that the convening authority erred when he neglected to consider whether Tuggle's proposal of voluntary allotments from Tuggle's pay would have accomplished the purpose of the fine. To support this assertion, the court looked to the United States Sentencing Guidelines, which provide that a defendant may pay a fine in installments, should the "lump sum . . . have an unduly severe impact on"[34] the defendant. The court also looked to 18 U.S.C. § 3572, which allows federal criminal courts to establish payment schedules for defendants who must pay fines.[35]

The court concluded that "Tuggle was not given an opportunity to make a good-faith effort to pay the fine."[36] Noting that the "single most important factor in [its] decision"[37] was the memorandum in which Tuggle asked to pay the fine in installments or monthly forfeitures, it remarked pointedly that the convening authority never expressed in the record why this proposal was rejected.[38] Accordingly, the court ruled that the convening authority erred in ordering Tuggle confined and in reducing him to private.

When the court rendered its judgment, Private Tuggle already had served his one year of confinement. Consequently, the court held that the fine was satisfied "by operation of law."[39] The court invalidated the fine and Tuggle's reduction to private, affirming only so much of the sentence as provided for his reduction to specialist.[40]

Lessons Learned

Rule for Courts-Martial 1113(d)(3) protects an accused who cannot pay a fine because of indigence or lack of monetary assets, but it provides little procedural guidance for ordering the execution of contingent confinement. Accordingly, practitioners must turn to case law that is still developing. This creates a potential mine field that should be avoided whenever possible. If, however, this situation cannot be avoided, judge advocates should follow the guidelines set forth below.

A convening authority should not approve a sentence provision allowing for contingent confinement unless the sentence also includes confinement that is not contingent upon the accused's failure to pay a fine.[41] Whenever possible, contingent confinement should append to an initial, adjudged term of confinement.

Before the suspense date for payment of the fine, the accused should be notified of the suspense date's impending arrival. He or she also should be advised that he or she must "make good-faith efforts" to pay the fine or, if the accused is indigent, must propose a reasonable alternative to a confinement that will satisfy the government's penal interests.[42] The accused should be informed that his or her failure to comply with one or the other of these requirements could result in his or her confinement and that the government will accept prompt partial payment as a reasonable alternative to imprisoning the accused.[43]

If the accused does not pay the fine by the required date, the officer exercising general court-martial jurisdiction over the accused when the R.C.M. 1113(d)(3) proceedings begin[44] should appoint a neutral hearing officer.[45] This hearing officer should determine whether the accused willfully refused to pay the fine or failed to make sufficient bona fide efforts to pay the fine[46] and whether, "in light of the nature of the offense and the characteristics of the person, alternatives to

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[34] U.S. Dep't of Justice, United States Sentencing Guidelines § 5E1.2(g) (1989).

[35] 18 U.S.C.A. §§ 3572(h)-(i), 3573 (West 1983 & Supp. 1991); *see also* United States v. Rascoe, 31 M.J. 544, 563 (N.M.C.M.R. 1990). In *Rascoe*, the Navy-Marine Corps Court of Military Review speculated that, were the President to establish guidelines for convening authorities to use when deciding whether to order contingent confinements executed, the President would look to "established federal criteria" in title 18, United States Code. *See id.* at 563; *see also* 18 U.S.C.A. §§ 3573, 3614 (West 1983 & Supp. 1991).

[36] *Tuggle*, 34 M.J. at 93.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *See supra* notes 5, 11. Recognizing that the courts of military review are split on this issue, the author advises judge advocates to follow the more conservative approach found in United States v. Shada, 28 M.J. 684 (A.F.C.M.R. 1989). The chief benefit of this strategy is that it accords the language of R.C.M. 1003(b)(3) its plain meaning. *See supra* note 11.

[42] This advice will satisfy the requirement of the Court of Military Appeals that the accused be afforded a reasonable opportunity to make good-faith efforts to pay the fine. Realistically, however, any accused that has been placed in confinement will have been reduced to private (E-1), either as a punishment under R.C.M. 1003(b)(5), or administratively, by operation of UCMJ article 58a. If the original punishment also included substantial forfeitures, the accused's chances of accumulating enough money to pay a fine are minimal.

[43] *Cf. Tuggle*, 34 M.J at 92 (relying upon the accused's perception that payment of the fine was an all-or-nothing proposition).

[44] *Rascoe*, 31 M.J. at 571.

[45] *See Tuggle*, 34 M.J. at 94, (Sullivan, C.J., concurring).

[46] The convening authority carefully should consider alternative payment plans offered by the accused. The military appellate courts probably will look to these proposed plans as good-faith efforts to pay the adjudged, approved fine.

imprisonment are not adequate to serve the purposes of punishment and deterrence."[47] The hearing officer should consider any alternative punishments the accused may propose.

In making these determinations, the hearing officer should consider the criteria set forth in 18 U.S.C. §§ 3572, 3573, and 3614, as applied in *Tuggle*[48] and *Rascoe*,[49] and should make specific findings about the accused's ability to pay the fine. In his or her analysis, the hearing officer should consider:

- The accused's income, earning capacity, and financial resources;
- The burden the fine will impose on the accused and on those financially dependent on the accused;
- The pecuniary losses, if any, that others have suffered;
- Whether restitution is appropriate and, if it is appropriate, whether the accused has made restitution; and
- The need to deprive the accused of the profit that he or she obtained illegally from the offense.[50]

The convening authority should review the findings of the hearing officer and should adopt or reject them explicitly. A convening authority's findings must be explicit to permit appellate courts to review them for abuse of discretion.[51]

Convening authorities should note carefully the factual determinations the Court of Military Appeals made in *Tuggle*. As the court explained, "good-faith" efforts by an accused may include offers of installment payments. They do not include inducing an accused's parents to incur a debt to help the accused to pay his or her fine.[52] Convening authorities also should note the court's apparent reluctance to require an accused to terminate support obligations to raise money to pay a fine.[53]

Although the *Rascoe* court recommended that a convening authority include the findings of fact in the action,[54] a separate memorandum outlining the convening authority's findings and rationale is adequate and keeps the action "clean." The memorandum should include the convening authority's findings of fact about the accused's indigence and should describe the opportunity given to the accused to pay the fine, the accused's efforts to pay, and any alternative measures to confinement the convening authority has considered. If the convening authority finds these alternatives inadequate to satisfy the penal interests of the government, the memorandum also should include a statement explaining why the alternatives are unacceptable.[55]

Conclusion

To enforce collection of a fine with contingent confinement often seems attractive. *Tuggle*, however, illustrates the difficulty in enforcing a confinement provision. In most instances, an accused cannot raise enough money to pay a fine. Even when an accused has been enriched unjustly by his or her crimes, he or she probably will have spent the spoils before the fine is adjudged. The end result will be a scenario similar to *Tuggle*, in which the government essentially attempts to squeeze water from a rock. Major Cuculic.

A Reminder from the Court of Military Appeals: Grant Challenges for Cause Liberally

The Court of Military Appeals recently reminded military judges and counsel that challenges for cause must be granted liberally. In *United States v. Berry*,[56] the court reversed the larceny convictions of a Navy petty officer when it found that the military judge improperly denied the accused's challenge of a member of the court-martial.

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[47] *Rascoe*, 31 M.J. at 563.

[48] *Tuggle*, 34 N.J. at 92.

[49] *Rascoe*, 31 M.J. at 563.

[50] *Id.* In *Rascoe*, the court identified a sixth standard, *see id.* (whether an accused can pass the fine on to consumers), but this standard normally will not apply to a military accused.

[51] *See Tuggle*, 31 M.J. at 778; Moore v. Akins, 30 M.J. 249 (C.M.A. 1990).

[52] *Tuggle*, 34 M.J. at 92.

[53] *Id.*

[54] *Rascoe*, 31 M.J. at 571.

[55] *Id.* at 571.

[56] United States v. Berry, 34 M.J. 83 (C.M.A. 1992).

Petty Officer Berry was tried by a special court-martial comprised of officer and enlisted members. Found guilty of three specifications of larceny, he appealed. Berry argued that the military judge improperly denied a defense challenge for cause against one of the enlisted members of the court-martial. The Navy-Marine Corps Court of Military Review opined that the military judge should have granted the challenge, but held that the judge's failure to do so did not constitute reversible error.[57]

During defense *voir dire*, the challenged enlisted member, Petty Officer Zabala, revealed that he was "a command duty investigator" on the same base as the accused. Zabala also disclosed that his duties required him "to interview, . . . interrogate, . . . and apprehend" suspects, including service members suspected of committing larcenies, and that he previously had participated in Naval Investigative Service (NIS) undercover operations.[58]

The trial counsel, attempting to rehabilitate Zabala, established that Zabala knew nothing of the case and that he would decide the case solely on the facts presented. Trial counsel, however, also established that the Zabala knew, and had worked with, one of the NIS agents who later would provide critical testimony against the accused.[59]

The military judge then asked Zabala several questions. Zabala responded that he could listen to the evidence, that he could remain impartial, that he had no preconceived opinion of guilt, and that he would listen to all the witnesses.[60]

The defense counsel challenged Zabala for cause, citing his duties as an investigator and his previous undercover work for NIS. The trial counsel opposed the challenge, stressing Zabala's representations of impartiality and his lack of knowledge of, or involvement in, the case. Commenting that Zabala's security duty was not a per se disqualification and that Zabala otherwise appeared qualified to sit, the military judge denied the challenge.[61]

The trial counsel and the defense counsel exercised their peremptory challenges against two officer members.[62] The military judge then revisited the denied causal challenge sua sponte, asking counsel to comment on the provisions of R.C.M. 912(f)(1)(N). This provision states that a member should not sit on a court-martial if his or her presence on the panel would raise a "substantial doubt as to legality, fairness, and impartiality" of the proceedings.[63] Defense counsel argued that Zabala should be disqualified under this provision. Once again, the trial counsel opposed the challenge. Relying primarily on Zabala's representations of impartiality and lack of knowledge of the case, the trial counsel asserted that the member's presence would not cast substantial doubt on the impartiality of the court-martial. The military judge again denied the challenge for cause.

On appeal, the Court of Military Appeals reached three conclusions about Petty Officer Zabala's status as a member: he was a former NIS undercover agent; he was a command duty investigator on the base where the larcenies had occurred; and he knew, worked with, and would continue to work with, an agent who ultimately testified against the accused.[64] The court acknowledged that none of these factors, standing alone, was a per se disqualification, but held that, when considered in combination, they "reasonably raised a substantial question as to the impartiality of Petty Officer Zabala sitting as a member in [the] case."[65] Rejecting the member's representations that he could remain impartial as "naked disclaimers," the court held that the Government had failed to purge the possibility of bias.[66] Accordingly, the court found that the member was disqualified from membership on the panel, reversed the court of military review, and set aside the findings and the sentence.[67]

Berry clearly comports with the statutory and judicial mandate that military judges must grant challenges for cause liberally.[68] The obvious purpose of this mandate is to ensure that an accused is tried by impartial members.[69] The mandate, however, is grounded in other concerns, as well. It attempts

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[57] *Id.*

[58] *Id.* at 84.

[59] *Id.* at 84-85.

[60] *Id.* at 85.

[61] *Berry*, 34 M.J. at 85-86.

[62] *Id.* at 86. The defense counsel's exercise of the peremptory challenge preserved for appellate review the denied causal challenge. *See* R.C.M. 912(f)(4); *see also* United States v. Jobson, 31 M.J. 117 (C.M.A. 1990)

[63] R.C.M. 912(f)(1)(N).

[64] *Berry*, 34 M.J. at 87.

[65] *Id.*

[66] *Id.* at 87-88.

[67] *Id.* at 88.

[68] United States v. Jobson, 31 M.J. 117 (C.M.A. 1990); United States v. Smart, 21 M.J. 15, 21 (C.M.A. 1985). *See generally* R.C.M. 912 analysis at A21-55.

[69] *Smart*, 21 M.J. at 19.

to ensure that an accused is tried by a panel that not only *is* impartial but also *appears* impartial to the accused and to outside observers.[70] It also contemplates the military's unique method of selecting members and recognizes that counsel in courts-martial have only one peremptory challenge each.[71]

For judge advocates, the mandate may be clear, but implementing the mandate is not. Military judges and counsel can identify a specific statutory disqualification easily. Deciding whether a member's participation casts a "substantial doubt" on the "fairness" of the proceedings, however, is less certain because the statutes essentially leave this determination to the arguments of counsel and the discretion of the military judge. The military judge's exercise of this discretion, of course, is subject to review. At least one court of military review has held that the standard for finding an abuse of discretion is lower when a military judge has denied a challenge for cause.[72]

Although the discussion to R.C.M. 912(f)(1)(N) lists examples of matters that might create "substantial doubt," military law provides practitioners with little additional guidance. Some considerations, however, are certain and *Berry* demonstrates that military judges should weigh them carefully when determining whether to grant a challenge. First, the military judge must consider the appearance that will be created if the challenged member remains on the panel.[73] In *Berry*, this factor alone should have weighed heavily in the decision to grant or deny a challenge for cause against Zabala. Second, the Court of Military Appeals will reject pro forma rehabilitation questions that are followed by predictable responses that contain little explanation.[74] Both parties should explore the responses of each member in detail to assess his or her qualifications to sit as a member of a court-martial. Finally, personnel who perform law enforcement duties normally should not be allowed to sit as members of a panel, even though they are not disqualified per se by the Uniform Code of Military Justice (UCMJ) or the Manual for Courts-Martial.[75] Although *voir dire* normally will reveal any actual bias a potential member may have that is incompatible with service on a panel, it cannot eliminate the perception that a potential member almost invariably would be biased by his or her experiences as a law enforcement officer. A military judge would be wise to avoid—or at least, to minimize—the inherent litigation risk of empaneling a police officer. Accordingly, the judge should consider carefully how the presence of a law enforcement agent on the panel will appear to the accused and to persons outside the military justice system and should scrutinize a potential member closely if he or she performs law enforcement duties.

Berry also contains lessons for trial advocates. For instance, a trial counsel must know when to join a challenge. He or she has a record to protect and will gain nothing by seeking a short-term victory that later turns to unsalvageable defeat. Defense counsel should recognize the persuasive impact of citing from R.C.M. 912 to support their challenges. A defense counsel not only should highlight a member's improper responses, but also should tie these responses to a specific provision of R.C.M. 912. The rule well may provide the military judge with a reason to grant the challenge for cause. Major Tate.

Pleading Adultery Under Article 134[76]

The United States Court of Military Appeals recently reversed an adultery conviction because the underlying specification was drafted improperly. In *United States v. King*,[77] the court held that an adultery specification fails to state a criminal offense if it fails to allege that one of the parties to the sexual act is married to another person. In so holding, the court distinguished a recent line of decisions in which it appeared to relax the traditionally strict rules of military pleading.

The accused, Staff Sergeant Willie L. King, was a married drill sergeant assigned to Fort Lee, Virginia. While serving in his capacity as drill sergeant, Sergeant King met a female soldier assigned to Fort Lee for advanced individual training. King and the trainee began dating and ultimately engaged in sexual intercourse. When their relationship was discovered, Sergeant King was charged and convicted, *inter alia*, of "wrongfully hav[ing] sexual intercourse with . . . [the trainee], a woman not his wife."[78] On appeal, Sergeant King argued that the specification failed to state an offense. The Court of Military Appeals agreed.

The court first examined the specification to see if it properly alleged the offense of fornication. Fornication

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[70] *Berry*, 34 M.J. at 88. *See generally* R.C.M. 912(f)(1)(N).

[71] *Smart*, 21 M.J. at 18-19, *cited with approval in Jobson*, 31 M.J. at 122 (Sullivan, C.J., concurring); *see also* United States v. Glenn, 25 M.J. 278 (C.M.A. 1987).

[72] United States v. Moyar, 24 M.J. 635 (A.C.M.R. 1987).

[73] *Berry*, 34 M.J. at 88.

[74] *Id. see also* United States v. Reichardt, 28 M.J. 113 (C.M.A. 1989).

[75] *See, e.g.*, United States v. McPhaul, 22 M.J. 808 (A.C.M.R. 1986); United States v. Swagger, 16 M.J. 759 (A.C.M.R. 1983).

[76] UCMJ art. 134.

[77] 34 M.J. 95 (C.M.A. 1992).

[78] *Id.*

generally is not punishable as an offense under military law unless it occurs "under such conditions of publicity or scandal as to enter that area of conduct given over to the police responsibility of the military establishment."[79] The court found that the allegation of "wrongful intercourse" in the questioned specification failed to aver misconduct of sufficient notoriety to satisfy this standard.

The court then examined the specification to see if it was sufficient to allege the offense of adultery. In doing so, it reiterated that one element of adultery is that "the accused or the other person was married to someone else."[80] The court then stated that, "as an allegation of 'adultery,' [the specification] lack[ed] utterly the essence of the offense—that at least one of the parties [was] married to another person."[81] Without this allegation, the court stated, "the essence of criminality was not even implied."[82] Accordingly, it held that the specification was fatally defective.

The court distinguished three decisions that had appeared to ease the strict rules that govern military pleading.[83] The court stated that "[a]lthough each of the specifications in [these] . . . three cases was defective to some degree, all of them clearly alleged that the accused had committed a particular offense under the UCMJ, and the time, place, and nature of the offense were clearly implied in the language of the *charge* and *specification*."[84] Because the specification in *King* was drawn under UCMJ article 134, neither the charge, nor the language of the questioned specification, was helpful in determining whether the Government properly stated an offense.

The Government easily could have avoided a reversal in *King* had the trial counsel taken more care to follow the form specifications set out in the Manual for Courts-Martial.[85] As the Court of Military Appeals noted in *United States v. Bryant*,

> it is beyond . . . understanding that a . . . [prosecutor] would undertake to draw . . . [a charge] without having before him [or her] the statute which defines the offense, or, having the statute before him [or her,] could be so careless as to omit allegations meeting the statutory definition of one of the essential elements of the crime.[86]

Major Hunter.

International Law Note

Codification of the "Special Forces Exception"

For the past eight years, Army Special Forces units have conducted training and operations with friendly foreign forces outside the continental United States. The Army has obtained funding for these operations under what has been termed the "special forces exception"—a phrase coined from the language of a 1986 Comptroller General decision concerning Department of Defense (DOD) activities in Honduras.[87] Although this 1986 General Accounting Office (GAO) opinion held that conventional United States forces may not use operation and maintenance appropriation funds during foreign exercises to provide more than basic familiarization and interoperability training to host nation forces, it specifically recognized that the unique mission of the Special Forces mandated an exception to this rule. The opinion stated,

> Training of indigenous military units is a fundamental role of the Special Forces; such training is provided as a means of utilizing indigenous forces as resources to achieve specific U.S. operational goals. To require that the host country utilize scarce security assistance funds for the limited training thereby imparted would be both impractical and unfair.[88]

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[79] *Id.* at 96.

[80] *Id.*

[81] *Id.* at 97.

[82] *Id.*

[83] *See* United States v. Bryant, 30 M.J. 72 (C.M.A. 1990) (holding that the omission of "wrongful" from specification for conspiracy to distribute controlled substances was not a fatal defect); United States v. Breechen, 27 M.J. 67 (C.M.A. 1988) (holding that the allegation of "wrongfulness" in connection with distribution of LSD was implicit in the specification as a whole); United States v. Watkins, 21 M.J. 208 (C.M.A. 1986) (holding that the omission of "without authority" from a specification of absence without leave was not fatal).

[84] *King*, 34 M.J. at 97.

[85] *See, e.g.*, Manual for Courts-Martial, United States, 1984, Part IV, para. 62*f*.

[86] *Bryant*, 30 M.J. at 74.

[87] *See* Ms. Comp. Gen. Dec. B-213137 (Jan. 30, 1986).

[88] *Id.* at 26.

Without this exception, a Special Forces unit could not fulfill a significant part of its mission—the training of indigenous forces. In recognizing the Special Forces exception, the GAO advised Congress to "consider clarifying the role of the Special Forces by specifically authorizing them to conduct (and use operational funds for) limited training of foreign forces during the course of field operations (actual or training exercises), for purposes of ensuring indigenous support of U.S. operations."[89]

With the passage of the National Defense Authorization Act for Fiscal Years 1992-1993,[90] Congress finally has codified the Special Forces exception.[91] The new statute adopts the restrictive tone of the GAO opinion, providing expressly that the primary purpose of operations funded under the statute must be "to train the special operations forces of the combatant command."[92] Subject to this guiding principle, the commander of Special Operations Command and the commanders of any other unified or specified combatant commands may draw on the DOD's operation and maintenance funds to pay, or authorize payment for, any of the following expenses:

> (1) Expenses of training special operations forces assigned to that command in conjunction with training, and training with, armed forces and other security forces of a friendly foreign country.
>
> (2) Expenses of deploying such special operations forces for that training.
>
> (3) In the case of training in conjunction with a friendly developing country, the incremental expenses incurred by that country as the direct result of such training.[93]

The definition of "special operations forces" includes civil affairs forces and psychological operations forces.[94] Detailed reporting requirements also are set out in the statute.

Operational law judge advocates must study the language of this statute carefully and must brief commanders and other operators meticulously. For additional information, judge advocates should contact the Center for Law and Military Operations (CLAMO), International Law Division, The Judge Advocate General's School, Charlottesville, VA 22903-1781. Major Addicott.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Family Law Note

State-by-State Analysis of the Divisibility of Military Retired Pay[95]

On 30 May 1989, the Supreme Court announced its decision in *Mansell v. Mansell*.[96] In *Mansell*, the Court ruled that states cannot divide the value of Department of Veterans Affairs (VA) disability benefits that are received in lieu of military retired pay.[97] It also suggested that, "under the . . . plain and precise language [of the Uniformed Services Former Spouses' Protection Act (USFSPA)], state courts have been granted the authority to treat disposable retirement pay as [divisible] community property; [but] they have not been granted the authority to treat [gross] . . . retired pay as community property."[98] *Mansell* overruled case law in a number of states—a fact that legal assistance attorneys should keep in mind when using the following materials.

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[89] *Id.* at 27.

[90] National Defense Authorization Act 1992-1993, Pub. L. No. 102-190, 105 Stat. 1290 (1991).

[91] *See id.* § 1052(a), 105 Stat. at 1471 (codified at 10 U.S.C. § 2011).

[92] *See* 10 U.S.C.A. § 2011(b) (West 1992).

[93] *Id.* § 2011(a).

[94] *Id.* § 2011(d)(1).

[95] This note updates TJAGSA Practice Note, *State-by-State Analysis of the Divisibility of Military Retired Pay*, The Army Lawyer, May 1991, at 48.

[96] 490 U.S. 581 (1989).

[97] *Id.* at 594.

[98] *Id.* at 589 (citing 10 U.S.C. § 1408(a)(4) (1988)).

Alabama

Military retired pay is not divisible as marital property. *Tinsley v. Tinsley*, 431 So. 2d 1304, 1307 (Ala. Civ. App. 1983) (military pay is not divisible as marital property) (citing *Pedigo v. Pedigo*, 413 So. 2d 1154 (Ala. Civ. App. 1981)); *Kabaci v. Kabaci*, 373 So. 2d 1144 (Ala. Civ. App. 1979). *But see Underwood v. Underwood*, 491 So. 2d 242 (Ala. Civ. App. 1986) (wife awarded alimony from husband's military disability retired pay); *Phillips v. Phillips*, 489 So. 2d 592 (Ala. Civ. App. 1986) (wife awarded fifty percent of husband's gross military pay as alimony).

Alaska

Military retired pay is divisible. *Chase v. Chase*, 662 P.2d 944 (Alaska 1983), (overruling *Cose v. Cose*, 592 P.2d 1230 (Alaska 1979), *cert. denied*, 453 U.S. 922 (1982)). Retirement benefits that have not vested are divisible. *Laing v. Laing*, 741 P.2d 649 (Alaska 1987). In *Morlan v. Morlan*, 720 P.2d 497 (Alaska 1986), a trial court ordered a civilian employee to retire to ensure that the employee's spouse would receive her share of his pension—the pension otherwise would have been suspended while the employee continued working. On appeal, the Alaska Supreme Court held that the trial court should have given the employee the option of continuing to work while periodically paying the spouse the sums she would have received from the retired pay. *Id.* (citing *In re Gillmore*, 629 P.2d 1 (Cal. 1981)).

Arizona

Military retired pay is divisible. *DeGryse v. DeGryse*, 661 P.2d 185 (Ariz. 1983); *Edsall v. Superior Court*, 693 P.2d 895 (Ariz. 1984); *Van Loan v. Van Loan*, 569 P.2d 214 (Ariz. 1977) (a nonvested military pension is community property). In a decision addressing a civilian retirement plan, the Arizona Supreme Court held that, if the employee is not eligible to retire when the trial court dissolves the marriage, the trial court *must* order the employee to pay his or her spouse the awarded share of retired pay as soon as the employee becomes *eligible* to retire, regardless of whether he or she actually retires then. *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986).

Arkansas

Military retired pay is divisible. *Young v. Young*, 701 S.W.2d 369 (Ark. 1986). *But see Durham v. Durham*, 708 S.W.2d 618 (Ark. 1986) (holding that military retired pay is not divisible unless the service member has served at least twenty years before the trial court enters the divorce decree because the military pension otherwise will not have "vested" before the marriage is dissolved).

California

Military retired pay is divisible. *In re Fithian*, 517 P.2d 449 (Cal. 1974); *In re Hopkins*, 191 Cal. Rptr. 70 (Ct. App. 1983). A nonresident service member did not waive his right under the USFSPA to contest California's assertion of jurisdiction over his military pension by consenting to the court's jurisdiction over other marital and property issues. *Tucker v. Tucker*, 226 Cal. App. 3d 1249 (1991); *Hattis v. Hattis*, 242 Cal. Rptr. 410 (Ct. App. 1987). Nonvested pensions are divisible. *See In re Brown*, 544 P.2d 561 (Cal. 1976); *cf. In re Mansell*, 265 Cal. Rptr. 227 (Ct. App. 1989) (on remand from *Mansell*, 490 U.S. at 581) (holding that service member's gross retired pay was divisible because it was based on a stipulated property settlement to which res judicata had attached). California law provides that military disability retired pay is divisible to the extent it replaces income that the retiree otherwise would have received as longevity retired pay. *In re Mastropaolo*, 213 Cal. Rptr. 26 (Ct. App. 1985); *In re Mueller*, 137 Cal. Rptr. 129 (Ct. App. 1977). *But see Mansell*, 490 U.S. at 589. If a service member is not retired when the marriage is dissolved, his or her spouse can elect to begin receiving the award share of "retired pay" as soon as the service member becomes *eligible* to retire, or at any time thereafter, even if the service member remains on active duty after qualifying for retirement. *In re Luciano*, 164 Cal. Rptr. 93 (Ct. App. 1980); *cf. In re Gillmore*, 629 P.2d 1 (Cal. 1981) (applying similar principle to a civilian pension plan).

Colorado

Military retired pay is divisible. *Gallo v. Gallo*, 752 P.2d 47 (Colo. 1988) (vested military retired pay is marital property); *see also In re Grubb*, 745 P.2d 661 (Colo. 1987) (holding that vested, but unmatured, civilian retirement benefits are marital property and expressly overruling contrary language in *Ellis v. Ellis*, 552 P.2d 506 (Colo. 1976)); *In re Nelson*, 746 P.2d 1346 (Colo. 1987) (applying *Grubb* to divide employee's vested pension benefits when these benefits were contingent upon the employee's survival to retirement age). The Colorado courts, however, will not apply *Gallo* retroactively. *See In re Wolford*, 709 P.2d 454 (Colo. Ct. App. 1989). Some practitioners in Colorado Springs have reported that, despite the unmistakable language in the case law, many local judges divide military retired pay or reserve jurisdiction on the issue even if the service member has not served twenty years.

Connecticut

Military retired pay is divisible. *See* Conn. Gen. Stat. § 46b-81 (1986) (affording divorce courts broad power to divide property); *cf. Thompson v. Thompson*, 438 A.2d 839 (Conn. 1981) (holding nonvested civilian pension divisible).

Delaware

Military retired pay is divisible. *Smith v. Smith*, 458 A.2d 711 (Del. Fam. Ct. 1983). Nonvested pensions are divisible. *Donald R.R. v. Barbara S.R.*, 454 A.2d 1295 (Del. Sup. Ct. 1982).

District of Columbia

Military retired pay probably is divisible. *See Barbour v. Barbour*, 464 A.2d 915 (D.C. 1983) (vested but unmatured civil service pension held divisible; dicta suggests that nonvested pensions also are divisible).

Florida

Military retired pay is divisible. Since 1 October 1988, Florida law has treated all vested and nonvested pension plans as marital property to the extent that they accrue during marriages. Fla. Stat. § 61.075(3)(a)4 (1988); *see also* 1988 Fla. Sess. Law Serv. § 3(1), at 342. These legislative changes apparently overrule the prior limitation in *Pastore v. Pastore*, 497 So. 2d 635 (Fla. 1986), that only vested military retired pay can be divided. This interpretation was adopted recently by the court in *Deloach v. Deloach*, 18 Fam. L. Rep. 1105 (Fla. Dist. Ct. App. Nov. 21, 1991).

Georgia

Military retired pay probably is divisible. *Cf. Courtney v. Courtney*, 344 S.E.2d 421 (Ga. 1986) (nonvested civilian pensions are divisible); *Stumpf v. Stumpf*, 294 S.E.2d 488 (Ga. 1982) (a court may consider a spouse's military retired pay when establishing alimony obligations). In *Holler v. Holler*, 354 S.E.2d 140 (Ga. 1987), the Georgia Supreme Court "[a]ssum[ed] that vested and nonvested military retirement benefits acquired during the marriage are now marital property subject to equitable division," *id.* at 141 (citing *Courtney*, 344 S.E.2d at 421; *Stumpf* 294 S.E.2d at 488 n.1), but concluded that military retired pay could not be divided retroactively unless it was subject to division when the divorce decree was entered, *id.* at 141-42.

Hawaii

Military retired pay is divisible. *Cassiday v. Cassiday*, 716 P.2d 1133 (Haw. 1986); *Linson v. Linson*, 618 P.2d 748 (Haw. Ct. App. 1981). In *Wallace v. Wallace*, 677 P.2d 966 (Haw. Ct. App. 1984), the trial court ordered an employee of the Public Health Service—an organization covered by the USFSPA—to pay his spouse a share of his retired pay when he reached retirement age, regardless of whether he actually retired then. Ignoring the employee's argument on appeal that the trial court effectively had ordered him to retire in violation of 10 U.S.C. § 1408(c)(3), the appellate court affirmed the order. In *Jones v. Jones*, 780 P.2d 581 (Haw. Ct. App. 1989), the court ruled that a trial court cannot circumvent *Mansell*'s limitation on dividing VA benefits by awarding an offsetting interest in other property. *Id.* at 583. It also held that *Mansell* applies to military disability retired pay, as well as to VA benefits. *Id.*

Idaho

Military retired pay is divisible. *Griggs v. Griggs*, 686 P.2d 68 (Idaho 1984) (reaffirming *Ramsey v. Ramsey*, 535 P.2d 53 (Idaho 1975)). Courts cannot circumvent *Mansell*'s limitation on dividing VA benefits by ordering an offset against other property. *Bewley v. Bewley*, 780 P.2d 596 (Idaho Ct. App. 1989).

Illinois

Military retired pay is divisible. *In re Dooley*, 484 N.E.2d 894 (Ill. App. Ct. 1985); *In re Korper*, 475 N.E.2d 1333 (Ill. App. Ct. 1985). *Korper* points out that, under Illinois law, a pension is marital property even if it has not vested. In *Korper*, the member had not yet retired. He objected to the spouse claiming the cash-out value of her interest in his retired pay, arguing that the USFSPA allowed division only of "disposable retired pay" and contending that the state courts, therefore, were preempted from awarding his spouse anything before he retired. By rejecting this argument, the court raised—but neglected to address—the critical question of whether a court may award the spouse of a service member a share of the service member's "retired" pay, effective when the member becomes *eligible* for retirement, even if the service member does not retire immediately. *Cf. In re Luciano*, 164 Cal. Rptr. 93 (Ct. App. 1980) (applying a similar rule). *See generally* Ill. Stat. Ann. ch. 40, para. 510.1 (Smith-Hurd Supp. 1988) (allowing courts to modify divorce agreements and judgments that became final between 25 June 1981 and 1 February 1983, unless the party opposing modification shows that the original disposition of military retired pay was appropriate).

Indiana

Military retired pay is divisible. Ind. Code § 31-1-11.5-2(d)(3) (1987) (amended in 1985 to provide that "property" for marital dissolution purposes includes, *inter alia*, "[t]he right to receive disposable retired pay, as defined in 10 U.S.C. § 1408(a), acquired during the marriage, that is or may be payable after the dissolution of the marriage"). A service member's right to receive retired pay must vest no later than the date the divorce petition is entered for his or her spouse to be entitled to a share, *Kirkman v. Kirkman*, 555 N.E.2d 1293 (Ind. 1990), but courts should consider nonvested military retired benefits in adjudging just and reasonable divisions of

property, *In re Bickel*, 533 N.E.2d 593 (Ind. Ct. App. 1989). *Compare Arthur v. Arthur*, 519 N.E.2d 230 (Ind. Ct. App. 2d Dist. 1988) (ruling that section 31-1-11.5-2(d)(3) cannot be applied retroactively to allow division of military retired pay in a case filed before the law's effective date of 1 Sept. 1985) *with Sable v. Sable*, 506 N.E.2d 495 (Ind. Ct. App. 3d Dist. 1987) (ruling that section 31-1-11.5-2(d)(3) can be applied retroactively).

Iowa

Military retired pay is divisible. *In re Howell*, 434 N.W.2d 629 (Iowa 1989). The service member already had retired in this case, but this decision may be broad enough to encompass nonvested retired pay as well. The court also ruled that disability payments from the VA, paid in lieu of a portion of military retired pay, are not marital property. *Id.* at 632-33. Moreover, the court apparently intended to award the spouse a percentage of the retiree's *gross* military retired pay, although it ultimately "direct[ed] that 30.5% of [the husband's] *disposable retired pay*, except disability benefits, be assigned to [the wife] in accordance with section 1408 of Title 10 of the United States Code . . . ." *Id.* at 633 (emphasis added). *Mansell* may have overruled the court's holding that it has authority to divide gross retired pay. *See Mansell*, 490 U.S. at 589.

Kansas

Military retired pay is divisible. Kan. Stat. Ann. § 23-201(b) (1987) (recognizing vested and nonvested military pensions as marital property, effective 1 July 1987); *see also In re Harrison*, 769 P.2d 678 (Kan. Ct. App. 1989) (holding that section 23-201(b) overruled previous case law prohibiting division of military retired pay).

Kentucky

Military retired pay is divisible. *Jones v. Jones*, 680 S.W.2d 921 (Ky. 1984); *Poe v. Poe*, 711 S.W.2d 849 (Ky. Ct. App. 1986) (military retirement benefits are marital property even before they "vest"); *see also* Ky. Rev. Stat. Ann. § 403.190 (Michie/Bobbs-Merrill Supp. 1991) (expressly defines marital property to include retirement benefits).

Louisiana

Military retired pay is divisible. *Swope v. Mitchell*, 324 So. 2d 461 (La. 1975); *Little v. Little*, 513 So. 2d 464 (La. Ct. App. 1987) (nonvested, unmatured military retired pay is marital property); *see also Gowins v. Gowins*, 466 So. 2d 32 (La. 1985) (soldier's participation in divorce proceedings constituted implied consent to the trial court's exercise of jurisdiction, empowering the court to divide the soldier's military retired pay as marital property); *Jett v. Jett*, 449 So. 2d 557 (La. Ct. App. 1984); *Rohring v. Rohring*, 441 So. 2d 485 (La. Ct. App. 1983); *see also Campbell v. Campbell*, 474 So. 2d 1339 (Ct. App. La. 1985) (a court can award a spouse a share of disposable retired pay, not gross retired pay, and a court can divide VA disability benefits paid in lieu of military retired pay; this approach conforms to the dicta in *Mansell* concerning divisibility of gross retired pay).

Maine

Military retired pay is divisible. *Lunt v. Lunt*, 522 A.2d 1317 (Me. 1987); *see also* Me. Rev. Stat. Ann. tit. 19, § 22-A(6) (1989) (providing that the parties become tenants-in-common in any property a court fails to divide or to set apart).

Maryland

Military retired pay is divisible. *Nisos v. Nisos*, 483 A.2d 97 (Md. Ct. App. 1984); *see also* Md. Fam. Law Code Ann. § 8-203(b) (1988) (directing the courts to treat pensions as they would other pension benefits—that is, as marital property under Maryland law); *Deering v. Deering*, 437 A.2d 883 (Md. 1981); *Ohm v. Ohm*, 431 A.2d 1371 (Md. Ct. App. 1981) (nonvested pensions are divisible). "Window decrees" that are silent on division of retired pay cannot be reopened solely because Congress subsequently enacted the USFSPA. *Andresen v. Andresen*, 564 A.2d 399 (Md. 1989).

Massachusetts

Military retired pay is divisible. *Andrews v. Andrews*, 543 N.E.2d 31 (Mass. App. Ct. 1989). In *Andrews*, the trial court awarded the spouse of a service member alimony from the service member's military retired pay. The spouse appealed, seeking a property interest in the pension. The appellate court upheld the trial court's ruling, but it also noted that "the [trial] judge could have assigned a portion of the pension to the wife [as property]." *Id.* at 32 (citing *Dewan v. Dewan*, 506 N.E.2d 879 (Mass. 1987)).

Michigan

Military retired pay is divisible. *Keen v. Keen*, 407 N.W.2d 643 (Mich. Ct. App. 1987); *Giesen v. Giesen*, 364 N.W.2d 327 (Mich. Ct. App. 1985); *McGinn v. McGinn*, 337 N.W.2d 632 (Mich. Ct. App. 1983); *Chisnell v. Chisnell*, 267 N.W.2d 155 (Mich. Ct. App. 1978); *see also Boyd v. Boyd*, 323 N.W.2d 553 (Mich. Ct. App. 1982) (only vested pensions are divisible).

Minnesota

Military retired pay is divisible. *Deliduka v. Deliduka*, 347 N.W.2d 52 (Minn. Ct. App. 1984). This case also holds that a

court may award a spouse a share of gross retired pay, *see id.*, but this portion of the decision may have been overruled by *Mansell*, 490 U.S. at 589. *See generally Janssen v. Janssen*, 331 N.W.2d 752 (Minn. 1983) (nonvested pensions are divisible); *Mortenson v. Mortenson*, 409 N.W. 2d 20 (Minn. Ct. App. 1987) (a court cannot assert jurisdiction over a soldier's retired pay based solely upon the soldier's past residence in the state).

Mississippi

Military retired pay is divisible. *Powers v. Powers*, 465 So. 2d 1036 (Miss. 1985). In *Brown v. Brown*, 574 So. 2d 688 (Miss. 1990), however, the court held that an ex-spouse has no automatic right to a soldier's or retiree's military pension and ruled that division of the pension is solely in the trial court's discretion.

Missouri

Military retired pay is divisible. Only disposable retired pay is divisible. *Moon v. Moon*, 795 S.W.2d 511 (Mo. Ct. App. 1990); *see also Fairchild v. Fairchild*, 747 S.W.2d 641 (Mo. Ct. App. 1988) (nonvested and nonmatured military retired pay are marital property); *Coates v. Coates*, 650 S.W.2d 307 (Mo. Ct. App. 1983).

Montana

Military retired pay is divisible. *In re Kecskes*, 683 P.2d 478 (Mont. 1984); *In re Miller*, 609 P.2d 1185 (Mont. 1980), *vacated and remanded sub nom. Miller v. Miller* 453 U.S. 918 (1981).

Nebraska

Military retired pay is divisible. *Taylor v. Taylor*, 348 N.W.2d 887 (Neb. 1984); *see also* Neb. Rev. Stat. § 42-366 (1989) (pensions and retirement plans are part of the marital estate).

Nevada

Military retired pay probably is divisible. *Tomlinson v. Tomlinson*, 729 P.2d 1303 (Nev. 1986) (speaking approvingly of the USFSPA in dicta but declining to divide retired pay in a case involving a final decree from another state). The Nevada state legislature reversed *Tomlinson* legislatively by enacting the Nevada Former Military Spouses Protection Act (NFMSPA). Nev. Rev. Stat. § 125.161 (1987) (military retired pay can be divided even if the decree is silent on division and even if the decree is foreign). The legislature, however, later repealed the NFMSPA, effective 20 March 1989. *See* 1989 Nev. Stat. 34. The Nevada Supreme Court subsequently ruled that the doctrine of res judicata bars a court from partitioning military retired pay when "the property settlement has become a judgment of the court." *See Taylor v. Taylor*, 775 P.2d 703 (Nev. 1989). Nonvested pensions are community property. *Gemma v. Gemma*, 778 P.2d 429 (Nev. 1989). The spouse of a service member or retiree may elect to receive his or her share when the employee spouse becomes eligible to retire, even if the employee spouse does not retire immediately. *Gemma v. Gemma*, 778 P.2d 429 (Nev. 1989).

New Hampshire

Military retired pay is divisible.

> Property shall include all tangible and intangible property and assets . . . belonging to either or both parties, whether title to the property is held in the name of either or both parties. Intangible property includes . . . employment benefits, [and] vested and nonvested pensions or other retirement plans . . . . [T]he court may order an equitable division of property between the parties. The court shall presume that an equal division is an equitable distribution . . .

N.H. Rev. Stat. Ann. § 458:16-a (1987). The New Hampshire Supreme Court relied on this provision in *Blanchard v. Blanchard*, 578 A.2d 339 (N.H. 1990), when it overruled *Baker v. Baker*, 421 A.2d 998 (N.H. 1980) (military retired pay not divisible as marital property, but it may be considered "as a relevant factor in making equitable support orders and property distributions").

New Jersey

Military retired pay is divisible. *Castiglioni v. Castiglioni*, 471 A.2d 809 (N.J. 1984); *Whitfield v. Whitfield*, 535 A.2d 986 (N.J. Super. Ct. App. Div. 1987) (nonvested military retired pay is marital property); *Kruger v. Kruger*, 354 A.2d 340 (N.J. Super. Ct. App. Div. 1976), *aff'd*, 375 A.2d 659 (N.J. 1977). Postdivorce cost-of-living raises are divisible; *cf. Moore v. Moore*, 553 A.2d 20 (N.J. 1989) (police pension).

New Mexico

Military retired pay is divisible. *Walentowski v. Walentowski*, 672 P.2d 657 (N.M. 1983); *Stroshine v. Stroshine*, 652 P.2d 1193 (N.M. 1982); *LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969); *see also White v. White*, 734 P.2d 1283 (N.M. Ct. App. 1987) (a court can award a spouse a share of gross retired pay). *But see Mansell*, 490

U.S. at 589 (gross retirement pay not divisible). In *Mattox v. Mattox*, 734 P.2d 259 (N.M. Ct. App. 1987), a case involving two civilians, the court cited the California *Gillmore* decision approvingly, suggesting that a court can order a service member to begin paying the spouse the spouse's share of the service member's retirement benefits when the service member becomes eligible to retire, even if the service member elects to remain on active duty. *See Mattox*, 734 P.2d at 259 (citing *In re Gillmore*, 629 P.2d 1 (Cal. 1981)).

New York

Military retired pay is divisible. Pensions in general are divisible. *See Majauskas v. Majauskas*, 463 N.E.2d 15 (N.Y. 1984). Most lower courts hold that nonvested pensions are divisible. *See, e.g., Damiano v. Damiano*, 463 N.Y.S.2d 477 (N.Y. App. Div. 1983). Case law seems to treat military retired pay as subject to division. *E.g., Lydick v. Lydick*, 516 N.Y.S.2d 326 (N.Y. App. Div. 1987); *Gannon v. Gannon*, 498 N.Y.S.2d 647 (N.Y. App. Div. 1986). Disability payments are separate property as a matter of law, but a disability pension is marital property to the extent it reflects deferred compensation. *See West v. West*, 475 N.Y.S.2d 493 (N.Y. App. Div. 1984). In *McDermott v. McDermott*, 474 N.Y.S.2d 221, 225 (N.Y. Sup. Ct. 1984), a decision involving two civilians, the court ruled that it can "limit the employee spouse's choice of pension options or designation of beneficiary where necessary, to preserve the nonemployee spouse's interest . . . ." This suggests that New York courts can order a member to elect Survivor Benefit Plan protection for a former spouse.

North Carolina

Military retired pay is divisible. N.C. Gen. Stat. § 50-20(b) (1988). In *Seifert v. Seifert*, 346 S.E.2d 504 (N.C. Ct. App. 1986), *aff'd on other grounds*, 354 S.E.2d 506 (N.C. 1987), the court suggested that an officer's pension vests when the officer completes twenty years' service, but an enlisted service member's pension vests only after he or she has served thirty years. *But see Milam v. Milam*, 373 S.E.2d 459 (N.C. Ct. App. 1988) (holding that a warrant officer's retired pay vested when he reached the eighteen-year "lock-in" point). In *Lewis v. Lewis*, 350 S.E.2d 587 (N.C. Ct. App. 1986), the court held that a divorce court can award a spouse a share of *gross* retired pay, but added that the wording of the state statute precluded awards exceeding fifty percent of a retiree's *disposable* retired pay. *But see Mansell*, 490 U.S. at 589.

North Dakota

Military retired pay is divisible. *Delorey v. Delorey*, 357 N.W.2d 488 (N.D. 1984); *see also Morales v. Morales*, 402 N.W.2d 322 (N.D. 1987) (affirming an order awarding 17.5% of a former service member's retirement pay to spouse of seventeen years because courts may consider equitable factors in dividing military retired pays); *Bullock v. Bullock*, 354 N.W.2d 904 (N.D. 1984) (a court can award a spouse a share of gross retired pay). *But see Mansell*, 490 U.S. at 589 (possibly overruling *Bullock*).

Ohio

Military retired pay is divisible. *Anderson v. Anderson*, 468 N.E.2d 784, (Ohio Ct. App. 1984); *see also Lemon v. Lemon*, 537 N.E.2d 246 (Ohio Ct. App. 1988) (nonvested pensions are divisible as marital property).

Oklahoma

Military retired pay is divisible. *Stokes v. Stokes*, 738 P.2d 1346 (Okla. 1987).

Oregon

Military retired pay is divisible. *In re Manners*, 683 P.2d 134 (Or. Ct. App. 1984); *In re Vinson*, 616 P.2d 1180 (Or. Ct. App. 1980); *see also In re Richardson*, 769 P.2d 179 (Or. 1989) (nonvested pension plans are marital property).

Pennsylvania

Military retired pay is divisible. *Major v. Major*, 518 A.2d 1267 (Pa. Super. Ct. 1986) (nonvested military retired pay is marital property).

Puerto Rico

Military retired pay is not divisible as marital property. *Delucca v. Colon*, No. 87-JTS-104 (P.R. Sept. 25, 1987). This case overruled *Torres-Reyes v. Robles-Estrada*, 115 P.R. Dec. 765 (1984), which had held that military retired pay is divisible. Pensions may be considered, however, in setting child support and alimony obligations.

Rhode Island

Military retired pay is divisible. R.I. Pub. Laws § 15-5-16.1 (1988) (giving courts very broad powers over the parties' property to effect an equitable distribution). A court, however, cannot use a soldier's implied consent to satisfy the jurisdictional requirements of 10 U.S.C. § 1408(c)(4). *Flora v. Flora*, 18 Fam. L. Rptr. (BNA) (R.I. Feb. 17, 1992).

South Carolina

Military retired pay is divisible. *Martin v. Martin*, 373 S.E.2d 706 (S.C. Ct. App. 1988) (vested military retirement

benefits are marital property; moreover, a present cash value determination can be based on gross pension value, rather than net pension value). *Martin* derived from a 1987 amendment to state law. *See* S.C. Code Ann. § 20-7-471 (Law. Co-op 1987). *But see Walker v. Walker*, 368 S.E.2d 89 (S.C. Ct. App. 1988) (a wife who lived with her parents throughout the entirety of her husband's naval service made no homemaker contributions to the marriage and, therefore, was not entitled to any portion of his military retired pay).

South Dakota

Military retired pay is divisible. *Gibson v. Gibson*, 437 N.W.2d 170 (S.D. 1989) (military retired pay—in this case, Reserve Component retired pay when the service member had served twenty years, but had not reached age sixty—is divisible); *Radigan v. Radigan*, 17 Fam. L. Rep. (BNA) 1202 (S.D. Sup. Ct. Jan. 23, 1991) (husband must share with ex-wife any increase in his retired benefits that resulted from his own, postdivorce efforts); *see also Hautala v. Hautala*, 417 N.W.2d 879 (S.D. 1987) (trial court's award to spouse of forty-two percent of former service member's military retired pay was not challenged on appeal); *Moller v. Moller*, 356 N.W.2d 909 (S.D. 1984) (commenting with approval on cases from other states that recognize divisibility, but declining to divide retired pay in the instant case because the former spouse neglected to appeal a 1977 divorce decree until 1983). *See generally Caughron v. Caughron*, 418 N.W.2d 791 (S.D. 1988) (the present cash value of a nonvested retirement benefit is marital property); *Hansen v. Hansen*, 273 N.W.2d 749 (S.D. 1979) (vested civilian pension is divisible); *Stubbe v. Stubbe*, 376 N.W.2d 807 (S.D. 1985) (in holding a civilian pension divisible, the court observed that "this pension plan is vested in the sense that it cannot be unilaterally terminated by [the] employer, though actual receipt of benefits is contingent upon [the worker's] survival and no benefits will accrue to the estate prior to retirement").

Tennessee

Military retired pay is divisible. *See* Tenn. Code Ann. § 36-4-121(b)(1) (1988) (defining all vested pensions as marital property). No reported Tennessee cases specifically concern divisions of military pensions.

Texas

Military retired pay is divisible. *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982); *see also Grier v. Grier*, 731 S.W.2d 936 (Tex. 1987) (a court can award a spouse a share of gross retired pay, but postdivorce pay increases constitute separate property). *But see Mansell*, 490 U.S. at 589 (possibly overruling *Grier* in part). *Ex Parte Burson*, 615 S.W.2d 192 (Tex. 1981), held that a court cannot divide VA disability benefits paid in lieu of military retired pay; this ruling comports with *Mansell*.

Utah

Military retired pay is divisible. *Greene v. Greene*, 751 P.2d 827 (Utah Ct. App. 1988). In *Greene* the court ruled that nonvested pensions can be divided under Utah law; moreover, in dicta, it suggested that only disposable retired pay is divisible—not gross retired pay. *But see Maxwell v. Maxwell*, 796 P.2d 403 (Utah App. 1990) (pursuant to a stipulation between the parties, the court ordered a military retiree to pay his ex-wife half the amount deducted for taxes from his retired pay).

Vermont

Military retired pay probably is divisible. In any divorce:

> The court shall settle the rights of the parties to their property by . . . equit[able] divi[sion]. All property owed by either or both parties, however and whenever acquired, shall be subject to the jurisdiction of the court. Title to the property . . . shall be immaterial, except where equitable distribution can be made without disturbing separate property.

Vt. Stat. Ann. tit. 15, § 751 (1988)

Virginia

Military retired pay is divisible. Marital property includes all pensions, whether or not vested. Va. Code Ann. § 20-107.3 (Michie 1988); *see also Mitchell v. Mitchell*, 355 S.E.2d 18 (Va. Ct. App. 1987); *Sawyer v. Sawyer*, 335 S.E.2d 277 (Va. Ct. App. 1985) (holding that military retired pay is subject to equitable division).

Washington

Military retired pay is divisible. *Konzen v. Konzen*, 693 P.2d 97 (Wash.), *cert. denied*, 473 U.S. 906 (1985); *In re Smith*, 657 P.2d 1383 (Wash. 1983); *Wilder v. Wilder*, 534 P.2d 1355 (Wash. 1975) (holding nonvested pension divisible); *Payne v. Payne*, 512 P.2d 736 (Wash. 1973).

West Virginia

Military retired pay is divisible. *Butcher v. Butcher*, 357 S.E.2d 226 (W. Va. 1987) (vested and nonvested military retired pay is marital property subject to equitable distribution and a court can award a spouse a share of gross retired pay). *But see Mansell*, 490 U.S. at 589.

Wisconsin

Military retired pay is divisible. *Thorpe v. Thorpe*, 367 N.W.2d 233 (Wis. Ct. App. 1985); *Pfeil v. Pfeil*, 341 N.W.2d 699 (Wis. Ct. App. 1983); *see also Leighton v. Leighton*, 261

N.W.2d 457 (Wis. 1978) (holding nonvested pension divisible); *Rodak v. Rodak*, 442 N.W.2d 489, (Wis. Ct. App. 1989) (holding that the portion of civilian pension that the employee spouse earned *before* marriage is included in marital property and is subject to division).

Wyoming

Military retired pay is divisible. *Parker v. Parker*, 750 P.2d 1313 (Wyo. 1988) (nonvested military retired pay is marital property).

Canal Zone

Military retired pay is divisible. *Bodenhorn v. Bodenhorn*, 567 F.2d 629 (5th Cir. 1978).

Major Connor.

Survivor Benefits Note

Dependency and Indemnity Compensation Rates[99]

Effective 1 December 1991, the federal government increased dependency and indemnity compensation (DIC) benefits by 3.7%.[100] In signing the measure, President Bush recognized that it will affect approximately 277,000 surviving spouses and 37,000 children who presently receive these benefits.

Dependency and indemnity compensation benefits are payable to eligible dependents of a deceased military member whose death from injury or disease occurred: (1) while the service member was on active duty; or (2) after the service member left active duty, if the cause of death was service-connected or if the former service member held a total service-connected disability rating, as determined by the VA. A dependent is not eligible for DIC if the injury or disease resulted from by the service member's willful misconduct.

Eligible recipients include: (1) the surviving spouse, to whom benefits will be paid for life or until remarriage; (2) a surviving child who is under the age of eighteen—or twenty-three, if he or she is attending school—or who is disabled during the period of eligibility; and (3) dependent parents of the service member who meet a maximum income test.

The following rates now are in effect:

1. Table of monthly amounts for a surviving spouse based upon the rank the military member held at the time of death:

		W4	$884	O10[101]	$1580
E9[102]	$841	W3	835	O9	1440
E8	805	W2	811	O8	1343
E7	762	W1	780	O7	1225
E6	727			O6	1134
E5	711			O5	1005
E4	693			O4	912
E3	652			O3	862
E2	635			O2	805
E1	616			O1	780

2. Additional monthly amounts paid to a surviving spouse with eligible children:
   a. Children under age eighteen: seventy-one dollars.
   b. Children from eighteen to twenty-three years old who are attending school: $157.
   c. Disabled child: $310.
3. Monthly amounts paid to children when no spouse survives the service member:
   a. 1 child: $310.
   b. 2 children: $447.
   c. 3 children: $578.
   d. For each additional child, add $114.

Major Hostetter.

Living Will Laws[103]

The chart on the following pages details existing Living Will statutes.[104] Massachusetts, Michigan, New York, and Pennsylvania have not adopted living will laws.[105]

[99] This note updates TJAGSA Practice Note, *DIC Rate Increases*, The Army Lawyer, June 1991, at 41.

[100] Veterans' Compensation Rate Amendments of 1991, Pub. L. No. 102-152, §§ 5-6, 1991 U.S.C.C.A.N. (105 Stat.) 985, 986-87 (amending 38 U.S.C. §§ 1311, 1313, 1314 (1988) to increase DIC benefits).

[101] If the veteran served as Chairman or Vice-Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, or Commandant of the Coast Guard, the rate shall be $1693. *Id.* § 5, 1991 U.S.C.C.A.N. (105 Stat.) at 987 n.2.

[102] If the veteran served as Sergeant Major of the Army, Senior Enlisted Advisor of the Navy, Chief Master Sergeant of the Air Force, Sergeant Major of the Marine Corps, or Master Chief Petty Officer of the Coast Guard, the rate shall be $907. *Id.*, 1991 U.S.C.C.A.N. (105 Stat.) at 987 n.1.

[103] This chart originally was prepared in February 1991 by the Decision Making Regarding Life-Sustaining Medical Treatment (DRLMT) Project, National Center for State Courts (NCSC), 300 Newport Avenue, Williamsburg, VA 23187-8798. Reprinted here with the permission of the NCSC, the chart has been updated to reflect information provided by the Society for the Right to Die and obtained through the author's legal research. The author believes that the information presented in this chart is accurate; however, the laws governing living wills represent a rapidly changing area of jurisprudence and legal assistance attorneys should use the chart only as a starting point for additional research.

[104] *See generally* Legal Assistance Branch, Administrative & Civil Law Division, The Judge Advocate General's School, U.S. Army, JA 273, Legal Assistance Living Wills Guide (June 1991). Legal assistance attorneys should note that the information in this chart supersedes conflicting state information.

[105] Massachusetts has no living will act, but Massachusetts courts may recognize living wills under Brophy v. New England Sinai Hosp., Inc., 497 N.E.2d 626 (Mass. 1986). New York does not have a living will law, but state courts should recognize living wills under *In re* Westchester County Medical Ctr., 531 N.E.2d 607 (N.Y. 1988).

Living Will Statutes	Patient's Condition Must Be Terminal.	Food and Fluids Cannot Be Forgone; or They Cannot Be Withheld if the Patient's Death Would Result from Malnutrition or Dehydration.	Comfort Care or Alleviation of Pain Is Required Even When Life Sustaining Medical Treatment (LSMT) Is Foregone.	Minors Have the Right to Make Declaration or to Have Declaration Made on Their Behalfs.
Alabama Code §§22-8A-1 to -10 (1990)	22-8A-3(5)		§ 22-8A-3(3)	
Alaska Stat. §§ 18.12.010-.100 (1986)	18.12.010	18.12.040[106]	18.12.040	
Arizona Rev. Stat. Ann. §§ 36-3201 to -3210 (1986)	36-201(5)	36-201(4)	36-201(4)	
Arkansas Stat. Ann. §§ 20-17-201 to -218 (Supp. 1989)	20-17-201(7)	20-17-206	20-17-206	-214 20-17-214
California Health and Safety Code §§ 7185 to 7194.5 (Supp. 1991)[107]	7186(h), (j)		7187(c)	
Colorado Rev. Stat. §§ 15-18-101 to -113 (1987 & Supp. 1990)	15-18-103(9)	15-18-104[108]	15-18-103(7)	
Connecticut Gen. Stat. Ann. §§ 19a-570 to -575 (West Supp. 1991)	19a-575	[109]	19a-573	
Delaware Code Ann. tit. 16 §§ 2501-2509 (1983)	2502(a)		2501(d)	
District of Columbia Code Ann. §§ 6-2421 to -2430 (1989)	6-2421(5)		6-2421(3)	

[106] "This chapter does not prohibit the application of any medical procedure or intervention, including provision of *nutrition and hydration*, considered necessary to provide comfort care or alleviation of pain. The declaration may provide that the declarant does not want *nutrition or hydration* administered intravenously or by gastric tube." Alaska Stat. § 18.12.040 (1986) (emphasis added).

[107] California recently amended its natural death act, effective 12 October 1991. *See* 1991 Cal. Legis. Serv. ch. 895 (West). As amended, the California act provides that a living will declaration may be given effect for a declarant who is permanently unconscious, that a declaration no longer must be re-executed every five years, and that a durable power of attorney for health care prevails over a declaration unless the power expressly provides otherwise. *Id.*

[108] A declarant may direct physicians to discontinue food or fluids when artificial nourishment is the only sustenance being provided. If an attending physician determines that the patient is suffering pain because of the discontinuance of nourishment, he or she may order artificial nourishment provided, but only to provide comfort to the patient and to alleviate the patient's pain. *See* Colo. Rev. Stat. § 15-18-104 (1987 & Supp. 1990).

[109] *See* McConnell v. Beverly Enters., 553 A.2d 596, (Conn. 1989) (holding that Connecticut Removal of Life Support Systems Act does not preclude removal of gastrostomy tube from comatose, terminally ill patient).

Living Will Statutes	Patient's Condition Must Be Terminal.	Food and Fluids Cannot Be Forgone; or They Cannot Be Withheld if the Patient's Death Would Result from Malnutrition or Dehydration.	Comfort Care or Alleviation of Pain Is Required Even When Life Sustaining Medical Treatment (LSMT) Is Foregone.	Minors Have the Right to Make Declaration or to Have Declaration Made on Their Behalfs.
Florida Stat. Ann. §§ 765.01-.15 (West 1986 & Supp. 1992)	765.03(5)	765.03(3)	765.03(3)	
Georgia Code Ann. §§ 31-32-1 to -12 (1991).	31-32-2(10)	31-32-2(5)(A)	31-32-2(5)(B)	
Hawaii Rev. Stat. §§ 327D-1 to -27 (Supp. 1991)	327D-2	327D-2	327D-2	
Idaho Code §§ 39-4502 to -4509 (1985 & Supp. 1990)	39-4504		39-4503(3)	
Illinois Ann. Stat. ch. 110 1/2, paras. 701-708 (Smith-Hurd Supp. 1991)	702(g)	702(d)	702(d)	
Indiana Code Ann. §§ 16-8-11-1 to -22 (Burns 1990)	16-8-11-14	16-8-11-4	16-8-11-4	
Iowa Code §§ 144A.1-.11 (1989)	144A.2(7)	144A.2(5)(b)	144A.2(5)(b)	
Kansas Stat. Ann. §§ 65-28, 101 to -28, 109 (1985)	65-28, 102(e)		65-28, 102(c)	
Kentucky Rev. Stat. §§ 311.622-.624 (Supp. 1990)	311.624(7)-(8)	311.624(5)(b)	311.624(5)(b)	
Louisiana Rev. Stat. Ann. §§ 40:1299.58.1-.10 (West Supp. 1991)	1299.58.1		1299.58.2(5)	1299.58.6
Maine Rev. Stat. Ann. tit. 18A, §§ 5-701 to -712 (West Supp. 1991)	5-701(7)	5-701(4)(a)[110]		

[110] A patient may express his or her desire to forgo food and fluids if he or she is terminally ill, but when the patient has not stated this intent explicitly, medical personnel may not withhold food and fluids. *See* Me. Rev. Stat. Ann. tit. 18A, § 5-701(4)(a) (West Supp. 1990).

Living Will Statutes	Patient's Condition Must Be Terminal.	Food and Fluids Cannot Be Forgone; or They Cannot Be Withheld if the Patient's Death Would Result from Malnutrition or Dehydration.	Comfort Care or Alleviation of Pain Is Required Even When Life Sustaining Medical Treatment (LSMT) Is Foregone.	Minors Have the Right to Make Declaration or to Have Declaration Made on Their Behalfs.
Maryland Health-Gen. Code Ann. §§ 5-601 to -614 (1990)	5-601(f)	5-605	5-605	
Minnesota Stat. Ann. §§ 145B.01 to .17 (West Supp. 1991)	145B.02	[111]	145B.13(1)	
Mississippi Code Ann. §§ 41-41-101 to -121 (Supp. 1990)	41-41-113			
Missouri Ann. Stat. §§ 459.010-.055 (Vernon Supp. 1991)	459.025	459.010(3)	459.010(3)	
Montana Code Ann. §§ 50-9-101 to -206 (1991) (Do Not Resuscitate-Notification Act, §§ 50-10-101 to -106 (1991))	50-9-102(14)	50-9-202(2)[112]	50-9-202	
Nebraska Leg. Bill[113] 671. Signed Feb. 12, 1992				
Nevada Rev. Stat. §§ 449.540-.690 (1986 & Supp. 1989)	449.590		449.570	
New Hampshire Rev. Stat. Ann. §§ 137H:1 to -H:16 (1990)	137H:2(V)-(VI)	137H:2(II)	137H:2(II)	

[111] A patient may express his or her desire to forgo food and fluids if she is terminally ill, but when the patient has not stated this intent explicitly, medical personnel may not withhold food and fluids. *See* Minn. Stat. Ann. § 145B.12 (West Supp. 1991).

[112] "This chapter does not prohibit the application of any medical procedure or intervention, including the provision of *nutrition and hydration*, considered necessary to provide comfort care or to alleviate pain." Mont. Code Ann. § 50-9-202(2) (1991) (emphasis added).

[113] Nebraska adopted the Rights of the Terminally Ill Act in February 1992. *See* 1992 Neb. Laws L.B. 671.

Living Will Statutes	Patient's Condition Must Be Terminal.	Food and Fluids Cannot Be Forgone; or They Cannot Be Withheld if the Patient's Death Would Result from Malnutrition or Dehydration.	Comfort Care or Alleviation of Pain Is Required Even When Life Sustaining Medical Treatment (LSMT) Is Foregone.	Minors Have the Right to Make Declaration or to Have Declaration Made on Their Behalfs.
New Jersey Advance Directives for Health Care Act, 1991 N.J. Sess. Law. Serv., ch. 201 (S.B. 1211) (West)	ch. 201, § 4			
New Mexico Stat. Ann. §§ 24-7-1 to -10 (Michie 1986)	24-7-3			24-7-4
North Carolina Gen. Stat. §§ 90-320 to -323 (1990)	90-321(b)(1)			90-321(b)(1)
North Dakota Cent. Code §§ 23-06.4-01 to -14 (Supp. 1989 & Interim Supp. 1991)	23.06.4-02(6)-(7)	23-06.4-02; 23-06.4-07(2)(4)	23-06.4-02(4); 23-06.4-07(2)	
Ohio Rev. Code Ann. §§ 2133.01-.15 (1992)	2133.02 (or permanently unconscious)			
Oklahoma Stat. Ann. tit. 63, §§ 3101-3111 (West Supp. 1991); § 3080.1 to -.4 (Supp. 1991)	3102(7)-(8)	3102(4)	3102(4)	
Oregon Rev. Stat. §§ 127.605-.650 (1989 and Supp. 1990)[114]	127.605(6)	127.605(3)	127.605(3)	
R.I. Gen. Laws §§ 23-4.11-1 to -13 (1991)	23-4.11-3(g) to (h)			

[114] Oregon has a Patient Self-Determination Act that generally mirrors the federal Patient Self-Determination Act, but also applies to facilities not covered by the federal act. *See* 1991 Or. Laws ch. 761 (S.B. 787).

Living Will Statutes	Patient's Condition Must Be Terminal.	Food and Fluids Cannot Be Forgone; or They Cannot Be Withheld if the Patient's Death Would Result from Malnutrition or Dehydration.	Comfort Care or Alleviation of Pain Is Required Even When Life Sustaining Medical Treatment (LSMT) Is Foregone.	Minors Have the Right to Make Declaration or to Have Declaration Made on Their Behalfs.
South Carolina Code Ann. §§ 44-77-10 to -160 (Law Co-op Supp. 1990); 1991 S.C. Acts 149 (H.B. 3000)	44-77-20(4), -30	44-77-20(2)[115]	44-77-20(2)	
S.D. Codified Laws Ann. §§ 34-12D-1 to -11 (1991)	34-12D-1(7), (8)		34-12D-1(9)	
Tennessee Code Ann. §§ 32-11-101 to -110 (Supp. 1992)	32-11-103(8)	[116] 32-11-104, 32-11-105(5) to (6)	32-11-104, 32-11-105(5) to (6)	
Texas Health & Safety Code Ann. §§ 672.001-.021 (West 1991)	6722.00(6)			
Utah Code Ann. §§ 75-2-1101 to -1118 (Supp. 1990)	75-2-1103(6)(a)	75-2-1103(6)(b) [117]	75-2-1103(6)(b)	
Vermont Stat. Ann. tit. 13, § 1801 (1987); *id.* tit. 18, §§ 5251-5262.	tit. 18, § 5252 (2)			
Virginia Code Ann. §§ 54.1-2981 to -2992 (Michie 1991)	54.1-2982		54.1-2982	
Washington Rev. Code Ann. §§ 70.122.010-.905 (West Supp. 1991)	70.122.020(6)		70.122.020(4)	

[115] "Life-sustaining procedures do not include the administration of medication or the provision of treatment, *nutrition and hydration* for comfort care or the alleviation of pain." S.C. Code Ann. § 44-77-20(2) (Law. Co-op Supp. 1990) (emphasis added).

[116] "'Medical care' includes . . . *artificial or forced feeding* . . . ." Tenn. Code Ann. § 32-11-103(5) (Supp. 1992) (emphasis added). "'Palliative care' includes any measure . . . designed primarily to maintain the patient's comfort. These also include . . . *nonartificial oral feeding* . . . . Any adult competent patient may execute a declaration directing the withholding or withdrawal of *medical care* to his person. . . ." *Id.* (emphasis added). *But see id.* ("this part shall not be interpreted to condone death by starvation or dehydration unless the provisions of . . . a LIVING WILL include . . . substantially the following [language]: 'I authorize the withholding or withdrawal of artificially provided food, water or other nourishment or fluids'").

[117] "Life-sustaining procedure does not include the administration of medication or *sustenance*, or the performance of any medical procedure deemed necessary to provide comfort care or to alleviate pain." Utah Code Ann. § 75-2-1103(6)(b) (Supp. 1990) (emphasis added).

Living Will Statutes	Patient's Condition Must Be Terminal.	Food and Fluids Cannot Be Forgone; or They Cannot Be Withheld if the Patient's Death Would Result from Malnutrition or Dehydration.	Comfort Care or Alleviation of Pain Is Required Even When Life Sustaining Medical Treatment (LSMT) Is Foregone.	Minors Have the Right to Make Declaration or to Have Declaration Made on Their Behalfs.
West Virginia Code §§ 16-30-1 to -10 (1991)	16-30-2(5)		16-30-2(3)	
Wisconsin Stat. Ann. §§ 154.01-.15 (West 1989)	154.03(1)	154.03(2)	154.03(2)	
Wyoming Stat. §§ 35-22-101 to -109 (1988)	35-22-101(v)	[118]	35-22-101(iii)	

[118] "Life-sustaining procedure does not include the administration of *nourishment*, medication or the performance of any medical procedure deemed necessary to provide comfort care or to alleviate pain." Wyo. Stat. § 35-22-101(a)(iii) (Supp. 1992) (emphasis added).

Claims Report

United States Army Claims Service

Management Notes

Budgeting for the Army Claims Program

The April 1987 issue of *The Army Lawyer* contained a note describing how the Army Claims Program was funded and how those funds were administered. Since then, a number of significant changes have taken place in this fiscal process. These changes pose new challenges to the United States Army Claims Service (USARCS) in participating in the funding process and in administering claims funds.

The most fundamental change occurred in the way that the claims program is funded. No longer does Congress set aside a specific sum each year for a single appropriation from which the three services may pay their claims. Now, each service's annual appropriation includes a claims budget item. This note explains how this and other changes affect the Army claims program and describes how USARCS administers the Army's claims dollars.

The Army claims program has become big business. During fiscal year (FY) 1991, it encompassed obligations for claims totalling more than $108 million. The three primary categories of claims accounts are personnel claims, status of forces agreement (SOFA) reimbursements, and tort claims. The Army's comprehensive personnel claims program is the largest item in the claims budget. In FY 1991, claims offices around the world settled 97,116 personnel claims at a cost of approximately $57 million. An additional $38.1 million were

needed for the United States to fulfill its FY 1991 obligation to reimburse foreign governments under the North Atlantic Treaty Organization SOFA and the Republic of Korea SOFA. Finally, slightly more than 10,000 tort claims were settled, obligating $10.8 million.

During FY 1991, the carrier recovery program reclaimed and deposited $13.4 million. These funds were returned to USARCS, which reallocated them to field offices to pay soldiers' claims.

By depositing carrier recovery dollars, the claims program effectively provides part of its own funding. Carrier recovery dollars deposited by USARCS and field claims offices each year comprise approximately thirteen percent of the claims budget and have become an essential source of funds in fiscal planning.

Funding for claims involves the same budgetary process as any other program funded with Operation and Maintenance, Army (OMA) dollars. The budget process requires USARCS to involve itself in the congressional budget cycle and to plan as accurately as possible for the next three to five fiscal years. The Budget Officer, USARCS, uses financial data collected from the field offices during the previous fiscal year to prepare an updated budget estimate for the next fiscal year. The next fiscal year is called the "budget year," as distinguished from the fiscal year then in progress, which is called the "current year." The budget year estimate specifies the total program requirement and the subtotals required for each of the fifteen statutory authorizations under which claims are paid. This estimate is submitted to the fiscal agents at Headquarters, Department of the Army, who manage Program 2, General Purpose Forces—the Army fiscal program under which claims are funded. After undergoing financial review, the proposed claims budget eventually is submitted to Congress as part of the President's annual budget for the Department of Defense.

The Budget Office, USARCS, uses several methods to calculate the fiscal needs of the claims program. For example, personnel preparing the dollar estimates for personnel claims not only consider the number of projected Army-wide permanent change of station moves and the projected end strength of the Army, but also conduct a historical trend analysis of past claims. The United States Army Claims Service, Europe, and the United States Armed Forces Claims Service, Korea, provide estimates of the amounts required for the United States to fulfill its treaty obligations under various SOFAs. To estimate the fiscal requirements of foreign claims commissions, the Budget Office uses input from the overseas command claims services. Because the Army claims program also funds settlements made by the Army Board for the Correction of Military Records (ABCMR) and the repayment of collections erroneously deducted from a soldier's pay, USARCS must obtain cost projections from ABCMR and must use historical trend analysis to project future costs for erroneous collections. Thus, the Budget Office considers all known planning factors in preparing the claims budget request to ensure that the annual Department of Defense appropriation will meet Army claims program requirements.

If these estimates are accurate, the claims program should close the fiscal year with only a small surplus. In FY 1990, claims budgeting and forecasting resulted in a surplus of less than a one percent. During FY 1991, the Army's mobilization of resources to support Operations Desert Shield and Desert Storm made budgeting more difficult. Nevertheless, at the end of FY 1991, the claims program had a sizeable surplus and offices were encouraged to pay as many meritorious claims as possible before the close of the fiscal year.

The Army Claims Service administers funds for the claims program under a centrally managed allotment (CMA). *See* Army Reg. 37-1, Army Accounting and Fund Control, para. 30-12 (30 Apr. 1991). This financial arrangement promotes the world-wide availability of claims funds. The claims CMA makes claims funds available to authorized users, regardless of the location of the office that is paying a claim. It also facilitates the returns of carrier recovery deposits to the personnel claims account.

The Budget Officer manages claims funds and maintains an account of the money deposited and disbursed. Receipt of a document called a funding authorization document (FAD)—issued by the Director, Operating Agency 22, Resource Services, Washington, D.C.—authorizes this officer to spend appropriated funds. Although the claims program operates under an annual budget, the authority to obligate claims funds is provided by FADs that are issued quarterly. Each FAD sets a ceiling on appropriated fund expenditures. As the FAD holder, the USARCS Budget Officer is responsible for funding the field offices and overseas command claims services at a level no higher than the sum of the amounts specified in the FADs and the total amount of carrier recoveries deposited that fiscal year. This funding is done by a command expenditure allowance (CEA) letter that provides each office with a spending target—that is, a specified dollar amount of funds that the office may use to pay claims. A new target is specified for each quarter of the fiscal year. The Budget Office can adjust a target upward or downward to respond to the fiscal needs of a claims office or overseas command claims service. Funds not used during one quarter are carried over for use in the next quarter throughout the fiscal year; however, no funds may be carried over from the fourth quarter, which ends the fiscal year on 30 September.

One may ask why all this financial budgeting and planning is required. Beginning in FY 1989, funding for claims became an OMA appropriation. This means that claims funds must be managed just as if they were any other Army fiscal program. The Army-wide impact of OMA funding has made each CONUS claims office and overseas command claims

service a fiscal manager of the claims funds provided in the CEA letters that it receives from the Budget Office. Claims offices must monitor the obligations of their claims funds and must stay within the cumulative quarterly targets specified in their CEA letters or request a funding adjustment from USARCS.

The challenge of budgeting for an Army-wide program highlights the importance of sound fiscal management. Fiscal flexibility also is critical if claims offices are to respond to disasters such as the California earthquake in October 1989 and the devastation done on the East Coast by Hurricane Hugo in September 1989. In addition, a warehouse fire or an act of God, such as an unusually severe hail storm, will generate a request for additional funds to pay claims at that locality. Operation Just Cause resulted in many claims by soldiers and civilian employees who suffered personal property losses. During Operations Desert Shield and Desert Storm, the Secretary of Defense assigned Foreign Claims Act responsibility for Kuwait to the Army. Events like these tax the claims budget and require careful financial management.

Beginning a fiscal year also requires careful financial management. If Congress and the President fail to agree on a defense budget before the fiscal year begins on 1 October, claims payments must cease unless Congress authorizes the Army activities to continue under a continuing resolution authority (CRA). Each CRA has an expiration date, after which claims payments must cease unless Congress enacts a new CRA or passes a Department of Defense appropriation that the President will sign.

During CRA periods, the USARCS Budget Office must operate the claims program with reduced funding. This reduces the funding that the Budget Office can provide to each continental United States (CONUS) field office and overseas command claims service. Carrier recovery dollars deposited on or after 1 October of the fiscal year augment this reduced funding. During CRA periods, carrier recovery is a major source of income and USARCS continuously must return carrier recovery dollars to field offices until appropriated funds are received. A CRA can last from twenty-four hours to one year. While operating under a CRA, claims offices should check periodically with the Budget Office, USARCS, to obtain the most recent financial information about the claims budget and the availability of funds.

Sound financial management now is the duty of every claims office. Accurate financial accounting is critical. Every month, each CONUS claims office and overseas command claims service must furnish USARCS with a budget report describing its obligations and deposits. Accurate monthly reports allow USARCS to manage claims funds effectively and to adjust funds from offices with excesses to offices with shortages. Using this data, the Budget Office also prepares a consolidated report that shows the monthly and year-to-date totals of claims funds obligated and deposited by each claims activity. It then compares this data with a monthly financial report for the activity recorded by the Defense Finance and Accounting Service (DFAS). The Army Claims Service uses reports furnished by claims offices and by DFAS to verify the flow of funds and to update budget forecasts.

Current Army procedures for paying claims permit USARCS and field claims offices to ascertain their claims funding needs accurately and to respond quickly to changing circumstances. Unlike its counterparts in the civilian insurance industry, USARCS has delegated substantial claims processing authority to its field offices. An Army claims officer, or a civilian attorney authorized to pay claims, has total supervisory responsibility for the administrative processing of a claim from receipt to payment. This results in better service to claimants in the form of faster and more accurate payments.

Managing this system and ensuring its continued effectiveness is a shared responsibility between the Budget Office, USARCS, and the field claims offices. By executing their responsibilities faithfully, claims personnel have repaid the Army many times over for the special trust it has reposed in them. The continued sound financial management of claims funds will ensure that the Army retains a flexible and responsive claims funding system that can support it effectively and efficiently throughout the world. Major Lazarek.

Transfer of Claims Responsibility

Effective 1 May 1992, under the authority granted by Army Regulation 27-20, Legal Services—Claims, para. 1-7b(4) (28 Feb 1990) [hereinafter AR 27-20], the Office of the Staff Judge Advocate, Headquarters, United States Army Garrison, Fort Leavenworth, KS, 66027-5060, office code 171, will assume responsibility for all claims arising in CONUS Area 18, which previously was assigned to the Office of the Staff Judge Advocate, Headquarters, United States Army Garrison, Fort Sheridan, IL, 60037-5000, office code 181. The Fort Sheridan office is scheduled to close as part of the current round of base realignments and closures.

The Office of the Staff Judge Advocate, Fort Leavenworth, will remain the area claims office for CONUS Area 17. Former CONUS Area 18 is merged with CONUS Area 17, effective 1 May 1992.

Fort McCoy, Wisconsin, a claims processing office with approval authority, is located within the new geographic region of Area 17. It will operate under the claims supervision of the Fort Leavenworth claims office in accordance with AR 27-20. Beginning 1 May 1992, Fort McCoy will use office code 172. Lieutenant Colonel Thomson.

Recording Carrier Recovery Data onto the Revised Personnel Claims Program

Discrepancies exist between the data that some claims offices transmit to the USARCS personnel claims database and the data these offices telephone in to the USARCS Budget

and Information Management Office. In particular, the USARCS database frequently reflects that some field offices deposited significantly less money in local carrier recovery than they claim in their reports to have deposited.

When USARCS receives a claims file, USARCS personnel enter a "mailroom date" into the file. This entry prevents a field claims office from updating the record and overwriting the data the USARCS personnel have entered. Unfortunately, it also prevents field claims offices from leisurely recording recovery data on files and transmitting this data to USARCS if they already have sent the files to USARCS for retirement. After USARCS receives a file, this data is "locked out."

Each claims office *must* enter the local deposit or local offset date and amount on the day that it deposits a check or completes an offset action. *See* Personnel Claims Note, *Retention of Personnel Claims Files in the Claims Office*, The Army Lawyer, Oct. 1990, at 58-59. The claims office also must enter the "forwarding for retirement" (FF) action code for the following day. The office then must keep the file for forty-five days before forwarding it to USARCS. During this time, the office must send USARCS at least one monthly data disk to ensure that its local recovery information is recorded onto the USARCS database. Claims judge advocates should discuss these procedures with their recovery and data entry personnel to ensure that their offices receive credit for the carrier recoveries that they accomplish. Mr. Frezza.

Affirmative Claims Notes

Medical Care Recovery from Civilian Doctors and Hospitals for Medical Malpractice

A doctor in the civilian community who commits malpractice on a family member or a retiree is a tortfeasor within the meaning of the Federal Medical Care Recovery Act (FMCRA). The United States may assert a claim under the FMCRA for the medical care it provides as a result of the malpractice, even if a Primary Care for the Uniformed Services contract facility provided the negligent care or the United States paid for the negligent care under the Civilian Health and Medical Program for the Uniformed Services.

Although affirmative claims based on medical malpractice normally are very large, doctors usually maintain sufficient insurance coverage to compensate both the injured party and the United States. In this respect, they differ from large automobile accident affirmative claims, which often must be compromised or waived. Because malpractice injuries are dissimilar to the trauma injuries that people normally associate with affirmative claims, medical treatment personnel often code these conditions as "diseases," rather than injuries, and fail to notify the claims office of these potential affirmative claims. Claims offices should ensure that their military treatment facilities and local plaintiffs' attorneys are aware that the United States may recover damages for medical malpractice.

In a medical malpractice case, however, an injured party might sue the United States as a joint medical care provider in addition to suing the civilian doctor or hospital. Affirmative claims personnel then must coordinate closely with the tort claims attorney handling the case or with the USARCS Tort Claims Division action attorney. Mr. Frezza.

The United States as a Third-Party Beneficiary of PIP Coverage

In two decisions, federal courts have affirmed that the United States can recover medical care expenses as a third-party beneficiary of personal injury protection (PIP) insurance coverage. In *United States v. Allstate Insurance Co.*, 910 F.2d 1281 (5th Cir. 1990), the Fifth Circuit affirmed a lower court ruling granting summary judgment against Allstate, ordering it to pay the federal government for the injured party's medical care, in addition to costs, attorneys' fees, and a twelve-percent penalty for wrongfully withholding payment. The Fifth Circuit noted that, although the care the United States provides to service members is "free" to the service members, it is not free to the United States. Therefore, it concluded that the United States should be deemed to be a third-party beneficiary of the Allstate policy, observing that Allstate otherwise would collect premiums from service personnel "for which it [had] assumed no insuring risk." *Id.* at 1282.

In a similar decision, the District Court for the District of Kansas held that the United States was a third-party beneficiary of an insurance policy issued by the United Services Automobile Association (USAA) despite USAA's attempt to change the language in its PIP endorsement. *See* United States v. United Servs. Auto. Ass'n, No. 90-1425, 1991 WL 152793 (D. Kan. July 2, 1991). The court noted that, although USAA had changed the language of its policy so that it no longer stated that it allowed payment to "the insured or [to] any organization rendering treatment," it had not changed the language in the coverage provision expressly to exclude the United States. *Id.* at *2. The court added that the Fifth Circuit's conclusion in *Allstate* that an insurance company should not be permitted to collect premiums without assuming the risk of payment under the policy "applie[d] with equal force" to the instant case. *Id.*

Both these cases show the greater willingness of the courts to recognize the United States as a third-party beneficiary of PIP coverage. Accordingly, claims personnel may find them useful in affirmative claims actions. To recover for care provided in a military treatment facility after 5 November 1990, claims offices also should cite 10 U.S.C. § 1095 (1988) as a compelling basis to persuade automobile insurers to settle. *See* 10 U.S.C.A. § 1095 (West Supp. 1991); Memorandum, Commander, U.S. Army Claims Service, subject: Guidance on Using 10 U.S.C. Section 1095 to Recover Medical Care Costs, 6 May 1991, *reprinted in* The Army Lawyer, Aug. 1991, at 47. Mr. Frezza.

Commander's Note

As I review requests for reconsideration for personnel claims by soldiers and civilian employees, I often find that denial has been based on AR 27-20, paragraph 11-5*a*. That paragraph denies compensation for property lost or damaged, in whole or in part, as a result of any negligence or wrongful act by the claimant, the claimant's family member, or the claimant's agent. Most often, the items in question are small pieces of jewelry stolen during the course of a carrier's packing or unpacking of household goods, and the "negligence" involves failing to safeguard these items adequately.

I am concerned about how we determine that a claimant was negligent. Our regulation defines negligence as a failure to act reasonably and prudently *under the circumstances.* It is the term "under the circumstances," upon which I ask you to focus when adjudicating a claim. When the issue of potential negligence arises in a claim, look at the surrounding circumstances at the time of the incident and ask yourself, "What could the claimant have done differently?" *and* "Were the claimant's actions really unreasonable?" Certainly, in hindsight, most incidents of theft, for example, could have been prevented. Rather than using hindsight, though, I ask you to put yourself in the place of the claimant at the time of the incident. Consider the chaos and pressure surrounding a move and the alternatives available. If you still believe that the claimant was negligent and the claim should be denied, please use the chronology sheet to memorialize your thought process. Remember, virtually any denial based on claimant negligence will generate a request for reconsideration, and it helps me, as the final decision maker, to have the benefit of your reasoning—not just your conclusion. Colonel Fowler.

Criminal Law Division Notes

Criminal Law Division, OTJAG

Courts-Martial of Military Retirees

But I'm old and I'm nervis,
I'm cast from the Service,
And all I deserve is a shillin' a day.

(Chorus) Shillin', a day,
Bloomin' good pay—
Lucky to touch it, a shillin' a day!

Rudyard Kipling

Introduction

Although retired members of the Armed Forces may be entitled to more pay and benefits than the "shilling a day" that their British counterparts received in the nineteenth century, they also are subject to military authority and may be ordered to active duty or tried by courts-martial. As members of the Armed Forces, military retirees are subject to the Uniform Code of Military Justice (UCMJ).[1] No serious question exists about the legal authority of the United States to exercise UCMJ jurisdiction over military retirees.[2] The question for judge advocates advising commanders is, when may commanders properly exercise UCMJ jurisdiction over retirees?

Military Retirees Are Subject to the UCMJ

Any individual who has retired from a regular component of the Armed Forces and who is entitled to pay from the Department of Defense is subject to the military jurisdiction pursuant to UCMJ article 2(a)(4). The abiding tradition of military jurisdiction over retirees derives from the premise that retired service members remain part of the Armed Forces and may be

[1] 10 U.S.C. § 801-946 (1988) [hereinafter UCMJ].

[2] *See* United States v. Allen, 33 M.J. 209 (C.M.A. 1991); Pearson v. Bloss, 28 M.J. 376 (C.M.A. 1989); United States v. Overton, 24 M.J. 309 (C.M.A. 1987); United States v. Hooper, 26 C.M.R. 417, 425 (C.M.A. 1958); United States v. Rogers, 30 M.J. 824, 828 (C.G.C.M.R. 1990); *see also* TJAGSA Practice Note, *Courts-Martial Jurisdiction Over Enlisted Retirees?–Yes, but a Qualified Yes in the Army*, The Army Lawyer, Oct. 1989, at 31.

called up to serve the United States in an emergency.[3] By statute, retirees may be ordered to active duty at any time to perform duties necessary to the interests of the national defense.[4]

Directives and Regulations

To implement this statute, the Secretary of Defense promulgated Department of Defense (DOD) Directive 1352.1.[5] This directive, *inter alia*, authorizes the military services to recall retirees involuntarily to active duty to facilitate the exercise of courts-martial jurisdiction over them.[6] The Army implemented this portion of the directive in the December 22, 1989, UPDATE to Army Regulation (AR) 27-10.[7]

Army Regulation 27-10 also provides that "retired Army personnel subject to the Code will *not* be tried for any offense by any courts-martial unless extraordinary circumstances are present."[8] Although this policy statement is relatively recent,

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[3] *Pearson*, 28 M.J. at 378 (quoting Toth v. Quarles, 350 U.S. 11, 15 (1955)); *Hooper*, 26 C.M.R. at 425; *see* William W. Winthrop, Military Law and Precedents 87 n.27 (2d ed. reprint 1920) ("That retired officers are a part of the army and so triable by court-martial [is] a fact indeed never admitting of question"); *see also* Dep't of Army, Pam. 27-174, Legal Services: Jurisdiction, para. 4-5(d)(6) (26 Sept. 1986). *But see* Comm. on the Uniform Code of Military Justice (and) Good Order and Discipline in the Army, Report to Honorable Wilber M. Brucker 175 (1960) (report by the Powell Committee, a panel of nine general officers appointed to study the Army's application of the UCMJ). In its report, the committee noted that

> retired members of the armed forces are merged with the general civilian population of the United States. They should be subject to the same laws as their neighbors with the same obligations and the same freedom of action. Courts-material jurisdiction imposes an obligation to abide by a different set of laws.

Id. The committee's recommendation was not adopted. *See* Frederick B. Wiener, *American Military Law in the Light of the First Mutiny Act's Tricentennial*, 126 Mil. L. Rev. 1, 44 (1989).

[4] The pertinent federal statue provides:

> Under regulations prescribed by the Secretary of Defense, a retired member of the Regular Army, . . . [or] a member of the Retired Reserve who has completed at least 20 years of active service . . . may be ordered to active duty by the Secretary of the military department concerned at any time. The Secretary concerned may, to the extent consistent with other provisions of law, assign a member ordered to active duty under this section to such duties as the Secretary considers necessary in the interests of national defense.

10 U.S.C. § 688(a) (1988).

[5] Dep't of Defense Directive 1352.1, Management and Mobilization of Regular and Reserve Retired Military Members (Mar. 2, 1990), 32 C.F.R. § 64.6 (1991) [hereinafter DOD Dir. 1352.1].

[6] Department of Defense Directive 1352.1 expressly provides:

> The Secretary of a Military Department may order any retired Regular member, retired Reserve member who has completed at least 20 years of active Military Service, or a member of the Fleet Reserve or Fleet Marine Corps Reserve to active duty without the member's consent at any time to perform duties deemed necessary in the interests of national defense in accordance with 10 U.S.C. [§] 688 .... This includes the authority to order a retired member who is subject to the Uniform Code of Military Justice (UCMJ) to active duty to facilitate the exercise of court-martial jurisdiction under . . . [UCMJ art. 2(a)]. A retired member may not be involuntarily ordered to active duty solely for obtaining court-martial jurisdiction over the member.

Id., para. F.3.c.

The last sentence of paragraph F.3.c. does not preclude the exercise of jurisdiction over retirees when jurisdiction already has been established by federal statute. The purpose of the restriction is to prevent a military service from ordering a retiree to active duty solely to subject him or her to UCMJ jurisdiction. For example, a retired Army Reservist who is not entitled to pay until age 60, *see* 10 U.S.C. § 1331 (1988), is not subject to the UCMJ unless he or she is hospitalized at a military facility. Accordingly, ordering this retiree to active duty to assert court-martial jurisdiction over him or her would violate the DOD directive.

[7] Army Reg. 27-10, Legal Services: Military Justice (22 Dec. 1989) [hereinafter AR 27-10].

[8] AR 27-10 para. 5-2*b*(3) (emphasis added). In its entirety, paragraph 5-2*b*(3) provides:

> Retirees. Retired members of a regular component of the Armed Forces who are entitled to pay are subject to the UCMJ (Art.2(a)(4)). They may be tried by courts-martial for offenses committed while in a retired status. Department of the Army policy provides that retired personnel subject to the Code will not be tried for any offense by any courts-martial unless extraordinary circumstances are present. Prior to referral of courts-martial charges against retired soldiers, approval will be obtained from HQDA (DAJA-CL). If necessary to facilitate courts-martial action, retired members may be ordered to active duty. Requests for active duty will be forwarded by electronic message through the Criminal Law Division, Office of The Judge Advocate General, to the Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs) for approval.

Significantly, a retired soldier may be tried in his or her retired status without ever being ordered to active duty. A retired soldier remains subject to military control and may be ordered to appear at an investigative hearing or trial. Although the pertinent regulations do not address the question specifically, a retiree who is ordered to appear at trial or a hearing without first being recalled to active duty must be reimbursed for the actual cost of transportation, meals, and other necessary expenses that he or she incurs in transit. Payment of a per diem allowance, however, is not authorized. 1 Joint Fed. Travel Reg., para. U7451 (Sept. 1, 1991); *cf.* Army Reg. 37-106, Finance and Accounting for Installations: Travel and Transportation Allowances, para. 13-33 (31 Jan. 1990) (providing that retired military personnel, not on active duty, who are called as witnesses are entitled to travel and transportation allowances); AR 27-10, para. 5-10.

the scarcity of reported courts-martial of retired soldiers[9] indicates that the Army consistently has declined to subject retirees to trials by courts-martial. The policy statement itself borrows most of its language from a 1956 opinion of The Judge Advocate General.[10] This opinion stated, in pertinent part, that "retired personnel subject to the Code will not be tried for any offenses by any military tribunal unless extraordinary circumstances are present . . . . Prior to the exercise of general court-martial jurisdiction over a retired person subject to the Code, approval of the Department of the Army should be obtained."[11]

The approaches taken by the other services have been diverse. The Navy and Marine Corps have no written policies. They examine each potential case on an ad hoc basis and the Secretary of the Navy ultimately must approve any exercise of UCMJ jurisdiction over a military retiree.[12] The Air Force generally avoids trying retirees unless "their conduct clearly links them with the military or is adverse to the United States."[13] The Coast Guard has not promulgated criteria, but, in practice, no case of a Coast Guard retiree is referred to trial by court-martial without the prior approval of the Commandant of the Coast Guard.[14]

Case Law

If service regulations are formal expressions of policy, case law reveals how that policy actually is applied. A review of past decisions shows that retirees only rarely have been subjected to UCMJ jurisdiction. The military services, however, have displayed a growing inclination to exercise criminal jurisdiction when an offense occurs overseas and the military has a special interest in the case.

The earliest reported case this author found in which a retiree was tried by court-martial under the UCMJ is *United States v. Hooper*.[15] In *Hooper*, the Navy recalled a retired admiral to active duty to stand trial for acts of criminal misconduct that had achieved considerable notoriety. The Court of Military Appeals affirmed the Navy's exercise of jurisdiction over Hooper. Six years later, in *United States v. Bowie*,[16] the court upheld the court-martial conviction of an airman, retired for physical disability, who had issued bad checks at an open mess while working as a civilian employee at an United States Air Force base in Canada. These early decisions affirmed the principle that retired members are part of the Armed Forces and are subject to the UCMJ.

Although each case stands on its own, a pattern may be descried from cases that have been tried in the past decade. In *United States v. Overton*,[17] the accused, a retired Marine retained on the rolls of the Fleet Marine Corps Reserve, worked as a civilian employee of the Naval Station at Subic Bay. Accused of stealing merchandise from the Naval Exchange, Overton was recalled to active duty, tried by court-martial, and convicted. *Pearson v. Bloss*[18] involved the trial of a retired Air Force master sergeant for larceny, unauthorized disposition of military property, concealing stolen military property and conspiracy. In each case, the Court of

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[9] This author is aware of only two recent Army cases involving the assertion of UCMJ jurisdiction over a retired soldier. One case, United States v. Sloan, 34 M.J. 17 (C.M.A. 1991) (misc. docket) recently was argued before the Court of Military Appeals. *See infra* notes 21-22 and accompanying text. In the other case, the Court of Military Appeals denied a petition for extraordinary relief—presented as a writ of habeas corpus—in which the petitioner, a retired soldier, challenged the authority of the Assistant Secretary of the Army to order him to active duty to facilitate possible court-martial action against him. *See generally infra* note 23 and accompanying text.

[10] *See* 7 Dig. Ops. JAG 1957-1958, *Courts-Martial*, § 45.8, at 108.

[11] *Id.*; *see also* Appellee's Brief at 16, *Sloan*, 34 M.J. 17 (C.M.A. 1992) (CM 9000288); Appellant's Brief at 10.

[12] Interview with Criminal Law Division, Department of the Navy (Mar. 17, 1992).

[13] Air Force Regulation 111-1 provides:

> Trial of Retired Regular Air Force Personnel. Retired regular Air Force personnel who are entitled to receive pay (article 2(a)(4), UCMJ) and retired members of a reserve component who are receiving hospitalization from an armed service (article 2(a)(5), UCMJ), will not be tried by court-martial unless their conduct clearly links them with the military or is adverse to the United States. Trial may not begin without approval by the Secretary of the Air Force. Requests for approval must be sent, with full justification, to HQ USAF/JAJM. However, prior approval is not necessary when personnel cash worthless checks at United States overseas military facilities under circumstances evidencing a fraudulent intent.

Air Force Reg. 111-1, Military Justice Guide, para. 3-5 (9 Mar. 1990).

[14] United States Coast Guard, Dep't of Transportation, Commandant's Instruction M5810.IC, Military Justice Manual, para. 2-B3 (15 Jan. 1991). The Commandant of the Coast Guard has delegated the authority to approve courts-martial referrals of retirees to the Chief of Counsel for the Coast Guard. *See id.*

[15] 26 C.M.R. 417, (C.M.A. 1958); *see also* Hooper v. United States, 326 F.2d 982 (Ct. Cl. 1964), *cert. denied*, 377 U.S. 977 (1964).

[16] 34 C.M.R. 411 (C.M.A. 1964).

[17] 24 M.J. 309 (C.M.A.), *cert. denied*, 484 U.S. 976 (1987).

[18] 28 M.J. 376 (C.M.A. 1989); *see also* TJAGSA Practice Note, *supra* note 2, at 31.

Military Appeals upheld the exercise of jurisdiction over the accused and affirmed his conviction.[19] The court also upheld a naval retiree's conviction of espionage on behalf of the Philippine Government and of disobeying security regulations in *United States v. Allen*.[20] The accused had committed these offenses while serving as a civilian reproduction clerk at the Naval Base at Subic Bay, where he routed routine and classified messages. In *United States v. Sloan*[21] the accused sexually molested his thirteen-year-old, adopted daughter while serving on active duty. Although Sloan retired one month after charges were preferred against him, he was tried by court-martial and convicted of these offenses.[22] Finally, the Army recently ordered a retired soldier to active duty to facilitate possible court-martial action against him. The soldier allegedly had murdered his wife on a military compound while he was employed as a Department of the Army civilian in Saudi Arabia.[23] At present, the charges have been preferred and the case is in the investigative stage.

Application

What pattern emerges from these cases? First, the military services rarely exercise jurisdiction over their retirees, even though military retirees are subject to UCMJ jurisdiction. Second, these cases excited direct military interests, involving offenses such as espionage against the United States or the larceny of property belonging to the federal government. Third, offenses by retirees that occurred overseas were more likely to be referred to courts-martial. For example, the situs of both reported Navy cases was the Philippines, where domestic United States courts cannot exercise jurisdiction.

Among the military services, the Army is the most restrained. As a matter of policy, it requires the Government to show that "extraordinary circumstances" exist before it will exercise court-martial jurisdiction over a retiree. What, then, are "extraordinary circumstances"? Although the reported cases come from the other services and, therefore, reflect different criminal justice policies, they may help to define this term. For instance, the reasoning that the Army recently applied when it recalled one retiree to active duty closely followed precedent set in the Navy cases mentioned above. Army judge advocates considered the inability of American courts to assert jurisdiction under title 18 to try an accused for the alleged murder of an American citizen in Saudi Arabia when they determined whether extraordinary circumstances existed that warranted exercising UCMJ jurisdiction over a retired soldier. The Army's decision paralleled the Navy actions in another respect. Judge advocates identified a compelling military interest that derived, at least in part, from the suspect's status as a Department of the Army civilian employee and from the discovery of the deceased's body on a United States compound.[24]

The discretion to subject a retired service member to court-martial action ultimately rests with the Assistant Secretary of the Army. Nevertheless, before a case involving a retiree reaches this level, criminal law practitioners should consider the following factors to determine whether "extraordinary circumstances" exist:

1. What is the Army's interest in the case?

2. Where is the situs of the offense?

   a. If the offense occurred in a foreign country:

      (1) Will prosecution by the foreign government serve the interests of justice?

      (2) Are foreign authorities willing to undertake the prosecution?

      (3) Can the United States readily prosecute the accused in a trial by court-martial? (Trial counsel should consider, *inter alia*, whether the witnesses are amenable to testify in a trial by court-martial.)

      (4) Does the offense discredit or otherwise compromise the interests of the United States?

   b. If the offense occurred within the United States or its territories:

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[19] *See Overton*, 24 M.J. at 311-12 (citing 10 U.S.C. §§ 6330(b), 6485(a) (1982) as specific authority for the Navy to exercise court-martial jurisdiction over a member of the Fleet Marine Corps Reserve); *Pearson*, 28 M.J. at 379 (noting that, as a former member of the active-duty Air Force who actually had received retirement pay, Pearson "clearly [met] all the requirements for courts-martial jurisdiction expressly provided in [UCMJ a]rticle 2(a)(4)").

[20] 33 M.J. 209 (C.M.A. 1991).

[21] 34 M.J. 17 (C.M.A. 1992). This case was referred to trial—and the court-martial was convened—before the Department of the Army directed that retirees should not be tried by courts-martial, absent extraordinary circumstances. *See* Appellee's Answer to the Assignment of Errors at 4, *Sloan* (CM 9000288); *see also supra* note 8. Sloan's appeal presently is pending decision by the United States Court of Military Appeals.

[22] Appellee's Brief at 3-4.

[23] This case is mentioned only to illustrate a recent decision to order a retiree to active duty. The decision to refer, to dismiss, or otherwise to dispose of the case rests within the sole discretion of the convening authority.

[24] *Cf. Overton*, 24 M.J. at 309 (accused retiree was a Department of the Navy civilian employee who committed offenses on a Navy installation); *Allen*, 33 M.J. at 209 (same).

(1) Are local, state, or federal authorities willing to undertake the prosecution?

(2) Would the interests of justice and the military service be served if the Army exercised jurisdiction under the UCMJ?

(3) Which process is more cost effective?

3. Is the accused an employee of the United States?

4. Did the offense occur on a military installation?

5. Is the victim a United States citizen?

6. Did the accused commit a crime against the United States?

7. Do any facts that are unique to this case support a policy determination that extraordinary circumstances exist?

Conclusion

The relative rarity of reported courts-martial involving military retirees reflects not only the sterling character of most retirees, but also the widespread availability of suitable civilian forums, both foreign and domestic, to try most criminal offenses. The presence of these forums generally makes the expenditure of scarce resources to try a retiree a poor investment. Occasionally, however, the military will have a significant interest in a criminal offense committed by a retiree. An advising judge advocate then must help the convening authority concerned to analyze whether extraordinary circumstances are present that justify exercising UCMJ jurisdiction over the suspect. Lieutenant Colonel Foote.

"Interservice" Courts-Martial and Reciprocal Jurisdiction

The Office of The Judge Advocate General, Criminal Law Division, recently reviewed the appeal[25] of a soldier convicted by an "interservice" court-martial. The case raised several important matters about reciprocal jurisdiction that judge advocates can expect to encounter more frequently in the future, given the increased emphasis on "jointness" and the dynamics of "building down."

The accused was an Army noncommissioned officer assigned to a Navy Transient Personnel Unit (TPU) in the Philippines. He was assigned to the TPU under an international legal hold, pursuant to a military bases agreement, pending his trial in a Philippine criminal court. While assigned to the Navy unit, the accused was tried by a special court-martial for military offenses unrelated to the foreign charges.[26] The court-martial was convened by a Navy commander. The military judge, trial counsel, and trial defense counsel all were Navy judge advocates and the court reporter also was a naval service member. The court-martial was composed of Army officers and enlisted members.[27]

Important to this case—and central to most issues that are unique to interservice courts-martial—are the meaning and the scope of UCMJ article 17, as amplified by Rule for Courts-Martial (R.C.M.) 201(e).[28] Article 17 provides:

> (a) Each armed force has court-martial jurisdiction over all persons subject to this chapter. The exercise of jurisdiction by one armed force over personnel of another armed force shall be in accordance with regulations prescribed by the President.

[25] The appeal was made pursuant to UCMJ article 69(b).

[26] The accused was charged with a failure to repair and breaking restriction. *See generally* UCMJ arts. 86, 134.

[27] Rule for Courts-Martial 503(a)(3) provides that

> a convening authority may detail as members of general and special courts-martial persons under that convening authority's command or made available by their commander, even if those persons are members of an armed force different from that of the convening authority or [the] accused.

Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 503(a)(3) [hereinafter R.C.M.]. The corresponding discussion, however, explains that

> members should ordinarily be of the same armed force as the accused. When a court-martial composed of members of different armed forces is selected, at least a majority of the members should be of the same armed force as the accused unless exigent circumstances make it impractical to do so without manifest injury to the service.

R.C.M. 503(a)(3) discussion.

[28] Rule for Courts-Martial 201(e) is based on UCMJ article 17 and on earlier provisions that appeared in the 1969 Manual for Courts-Martial. *See* R.C.M. 201(e) analysis, app. 21, at A21-8 to 21-9; *see also* Manual for Courts-Martial, United States, 1969 (rev. ed.), para. 13. The rule has been amended to implement the Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, § 211(b), 100 Stat. 992, 1012. *See* R.C.M. 201(e) analysis.

(b) In all cases, departmental review after that by the officer with authority to convene a general court-martial for the command which held the trial, where that review is required under this chapter, shall be carried out by the department that includes the armed force of which the accused is a member.

Rule for Courts-Martial 201(e) implements UCMJ article 17. Subsection (e)(2) prescribes a commander's authority to convene interservice courts-martial. Rule for Courts-Martial 201(e)(2)(A) specifies that the "commander of a unified or specified combatant command may convene courts-martial over members of any of the armed forces." Subsection (e)(2)(B) provides that "joint command" and "joint task force" commanding officers likewise may convene courts-martial for all service members.[29] Subsection (e)(2)(C) adds that any of the commanders described above may authorize subordinate "joint force" or "joint task force" commanders to convene special or summary courts-martial.

Rule for Courts-Martial 201(e)(3) comprises an unusual blend of direction and guidance.[30] Subsection (e)(3) provides:

> A member of one armed force may be tried by a court-martial convened by a member of another armed force when:
>
> (A) The court-martial is convened by a commander authorized to convene courts-martial under subsection (e)(2) of this rule; or
>
> (B) The accused cannot be delivered to the armed force of which the accused is a member without manifest injury to the armed forces.
>
> An accused should not ordinarily be tried by a court-martial convened by a member of a different armed force except when the circumstances described in (A) or (B) exist. However, failure to comply with this policy does not affect an otherwise valid referral.

The rule recognizes "manifest injury to the armed forces"[31] as a policy basis that justifies an interservice court-martial, but also provides that the failure to satisfy this policy will not deprive an otherwise properly constituted court-martial of jurisdiction. Accordingly, the analysis to R.C.M. 201 declares that "a court-martial convened by a commander of a service different from the accused's is not jurisdictionally defective nor is the service of which the convening authority is a member an issue in which the accused has a recognized interest."[32] As the analysis correctly explains, "The rule and its guidance effectuate the congressional intent that reciprocal jurisdiction ordinarily [should] not be exercised outside of joint commands or task forces . . . and is designed to protect the integrity of intraservice lines of authority."[33]

Neither the rule, nor decisional law, precisely defines "manifest injury" as contemplated in the context of reciprocal jurisdiction. The discussion to R.C.M. 201(e), however, explains that "'manifest injury' does not mean minor inconvenience or expense."[34] The discussion also provides illustrative examples of manifest injuries, including "direct and substantial effect on morale, discipline, or military operations, substantial expense or delay, . . . [and] loss of essential witnesses."[35]

In the instant case, the defense moved to dismiss the charges for lack of jurisdiction. In response, the Government argued that three separate "manifest injuries" could result if the accused were not tried by a court convened by the Navy convening authority. First, the Government contended that the accused was subject to the international hold and could not be transferred to an Army unit outside the Philippines without violating the military bases agreement. Second, the Government remarked that most of the witnesses resided in the Philippines, including two civilian defense witnesses. It emphasized that the civilian witnesses would need passports and visas to travel outside of the Philippines, asserting that

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[29] R.C.M. 201(e)(2)(B). Subsection (e)(2)(B) also notes that the President has delegated to the Secretary of Defense the authority under UCMJ article 22(a)(9) to empower joint command and joint task force commanders to convene courts-martial in accordance with the Rules for Courts-Martial. *See id.* The analysis to R.C.M 201(e) elaborates that "[t]his provision . . . may be used by the Secretary of Defense to grant general court-martial convening authority to commanders of joint commands or joint task forces who are not commanders of . . . unified or specified command[s]." R.C.M. 201(e) analysis at A21-8. The analysis also explains that "[n]othing in this provision affects the authority of the President or Secretary of Defense, as superior authorities, to withhold court-martial convening authority from . . . combatant commanders in whole or in part." *Id.*

[30] *See generally* Manual for Courts-Martial, United States, 1984, analysis, app. 21, at A21-2 ("Each rule states binding requirements except when the text of the rule expressly provides otherwise").

[31] This "language was modified to clarify that manifest injury is not limited to a specific armed force." R.C.M. 201(e) analysis at A21-8.

[32] *Id.*

[33] *Id.* (citing United States v. Hooper, 18 C.M.R. 15 (C.M.A. 1955); *Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st sess. 612-15, 957-58 (1949)).

[34] R.C.M. 201(e) discussion.

[35] *Id.*

these could not be obtained without considerable expense. Finally, the Government pointed out that the United States and the Philippines were engaged in sensitive treaty negotiations and argued that the accused's transfer from the Philippines could cause political disharmony between the two nations. The defense countered that the United States Army Support Command in Hawaii could convene the accused's court-martial without having to move the accused from the Philippines. Nevertheless, the military judge denied the defense's motion to dismiss. The accused subsequently appealed under UCMJ article 69, but failed to establish a sufficient basis for relief.

As a practical matter, the Army already has participated in several interservice courts-martial. Many Army military judges have sat on courts-martial of accused from other services. Similarly, military judges from other services have presided over courts-martial of Army soldiers. The Manual for Courts-Martial expressly recognizes the legitimacy of these interservice courts-martial compositions.[36]

Unfortunately, little case authority or other guidance about reciprocal jurisdiction presently exists outside of UCMJ article 17 and R.C.M. 201(e). Military practitioners, however, should expect these issues to receive greater attention in coming years as the Armed Forces increasingly become involved in joint operations. Major Milhizer.

Amendment to Military Rule of Evidence 404(b)

On 1 December 1992, Federal Rule of Evidence 404(b) was amended to require the Government—upon a request from the defense—to provide pretrial notice of the general nature of any evidence of other crimes, wrongs, or acts that the prosecution intends to introduce at trial. The previous version of the federal rule did not require this notice. The full text of the amended rule, with the additional language emphasized, is as follows:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, *provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.*

Military Rule of Evidence 404(b) is based on Federal Rule of Evidence 404(b).[37] In accordance with the previous version of the federal rule, Military Rule of Evidence 404(b) did not require the Government to provide pretrial notice of "uncharged misconduct" evidence upon defense request.

Military Rule of Evidence 1102 provides, "Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 180 days after the effective date of such amendments unless action to the contrary is taken by the President." No presidential action to the contrary is expected with respect to the newly amended Federal Rule of Evidence 404(b).[38] Accordingly, Military Rule of Evidence 404(b) will be amended to incorporate the change to Federal Rule of Evidence 404(b), as a matter of law, on 29 May 1992.[39] The amendment will apply to all courts-martial in which arraignments are completed on or after 29 May 1992.

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[36] R.C.M. 201(e)(4) provides, "Nothing in this rule prohibits detailing to a court-martial a military judge who is a member of an armed force different from that of the accused or the convening authority, or both."

[37] *See* Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 404(b) analysis, app. 22, at A22-32.

[38] Actually, the Joint Service Committee on Military Justice (JSC) has recommended that Military Rule of Evidence 404(b) incorporate the amendment to the federal rule with minor, technical modifications to comport with military practice. Considerable time and coordination are necessary, however, before the President can act on the JSC proposal. *See generally* Criminal Law Division Note, *Amending the Manual for Courts-Martial*, The Army Lawyer, Apr. 1992, at 78.

[39] Likewise, Military Rule of Evidence 609(a), concerning impeachment by evidence of conviction of a crime, recently was amended by operation of Military Rule of Evidence 1102. The amended version of Military Rule of Evidence 609(a), with minor technical modifications, is incorporated as part of proposed change 6 to the Manual for Courts-Martial.

Labor and Employment Law Notes

OTJAG Labor and Employment Law Office and
TJAGSA Administrative and Civil Law Division

Labor Relations Notes

Cooperative Labor-Management Relations Workshops

The Federal Labor Relations Authority (FLRA) has concluded that it cannot improve labor relations simply by investigating and prosecuting charges of unfair labor practices. Accordingly, the Office of General Counsel, FLRA, has created a cooperative training program to teach management and unions about their obligations and their rights under the Federal Service Labor-Management Relations

Statute. The Office of the General Counsel currently runs three different workshops to promote heightened awareness of conflict resolution through dispute avoidance and cooperation.

Workshop 1
"Knowledge, Communication & Trust"

This program is aimed at resolving specific problems that exist at a particular facility. Before the workshop begins, personnel from the General Counsel's Office contact management and union representatives individually to discuss the issues each side believes that the workshop should cover.

Two significant aims of the workshop are to discuss and—if possible—to resolve these issues. The participation of key managers and union officials is essential to the workshop's success. Accordingly, both the management and the union must agree to participate fully in the program.

The program emphasizes a cooperative approach, in which both parties participate at the same time and, for the most part, in the same room. Each workshop typically lasts two or three days, depending on the needs of the parties.

Workshop 2
"Dispute Avoidance Through Communication"

The primary purpose of this program is to give managers and union representatives an opportunity to develop the communication and dispute avoidance skills necessary for a productive labor-management environment. These objectives are achieved through a combination of lectures, role playing, and problem solving exercises. The program is designed to provide the participants with practical, hands-on instruction in dealing with real life labor relations problems. The General Counsel's Office may restrict attendance to management or to union members, or may permit employees and managers to participate together. The workshop normally is two or three days long.

Workshop 3
"Customized Problem Resolution"

In addition to its other workshops, the FLRA General Counsel's Office offers customized training seminars for agencies and labor organizations. The goal of these sessions is to provide managers and employees with a new approach for resolving unfair labor practice issues without resorting to the statutory process. Tailored to meet specific needs, these programs encourage federal employees at all levels to learn the skills necessary to communicate, to cooperate, to avoid disputes, and to resolve problems in an atmosphere conducive to mutual trust. A customized workshop may include training on the development and use of a joint labor-management dispute resolution committee. The FLRA General Counsel's staff also teaches dispute resolution techniques to new labor relations employees.

Conclusion

These three workshops offer management and unions a chance to improve their abilities to resolve labor disputes without resorting to extended litigation. Labor counselors who believe that their commanders or supervisors would be interested in exploring one or more of these workshops should contact the Labor and Employment Law Office, Office of The Judge Advocate General, ATTN: DAJA-LE, Washington, DC 20310, or should call (703) 695-9300 or DSN 225-9300.

Pay and Fringe Benefit Bargaining

The Federal Service Impasses Panel (FSIP or Panel) recently considered proposals addressing the costs of health insurance premiums for the employees of a nonappropriated fund instrumentality (NAFI) at Fort Eustis, Virginia.[1] The union had proposed that management pay seventy percent of the premium costs. Management had countered by proposing that the NAFI share the costs equally with its participating employees. After considering both proposals, the FSIP ordered the parties to adopt a compromise, directing the NAFI to pay sixty percent of the health insurance premium costs incurred by bargaining unit employees.

In reaching this decision, the FSIP looked at the benefits received by appropriated fund employees under analogous programs to determine what was fair and appropriate. Noting that many appropriated fund instrumentalities pay approximately sixty percent of their employees' health insurance costs, the Panel concluded that the management's plan to divide premium costs evenly between the NAFI and the employees would perpetuate a disparity in treatment between the NAFI employees and appropriated fund instrumentality employees. It dismissed as mere speculation the management's argument that the increased health insurance costs would force the NAFI to reduce funding for the services it provides to soldiers and their families.

The Panel also considered a union proposal that the NAFI permit temporary and intermittent employees to participate in the health insurance program. It concluded, however, that the administrative burdens of extending coverage to these employees outweighed any benefit the extended coverage would provide. Accordingly, it ordered the union to withdraw the proposal.

"Postliminary" Overtime Under the Federal Labor Standards Act Is Not Negotiable

In *Department of the Air Force v. Federal Labor Relations Authority*,[2] the agency built a security fence that limited

[1] National Ass'n of Gov't Employees, Local R4-6, 91 Fed. Serv. Imp. Pan. Rel. 200 (1992).

[2] 952 F.2d 446 (D.C. Cir. 1991).

ingress and egress to an installation. As part of impact and implementation bargaining, the union proposed that employees at the installation should be granted overtime if they were delayed in leaving the premises at the end of their tours. The Court of Appeals for the District of Columbia found this proposal nonnegotiable.

The Office of Personnel Management (OPM) has issued regulations implementing the Fair Labor Standards Act[3] (FLSA) and the Federal Employees Pay Act[4] (FEPA).[5] These regulations provide that postshift activities that do not relate closely to an employee's primary work are "postliminary" and noncompensable. The FLRA, however, held in its negotiability decision that the OPM regulations do not preclude federal employees from negotiating for overtime compensation for postliminary activities.[6] The appellate court disagreed, stating that the union's proposal conflicted with the OPM regulations. Noting that 5 U.S.C. § 7117(a)(1) provides that a proposal is nonnegotiable if it conflicts with any "[f]ederal law or . . . Government-wide regulation,"[7] the court concluded that the proposal was nonnegotiable.[8]

Procedures for Last-Chance Agreements Are Negotiable

The Court of Appeals for the District of Columbia and the FLRA agree that, when executing a last-chance agreement, management is not exercising its statutory right to discipline under 5 U.S.C. § 7106(a)(2)(A). On the contrary, a last-chance agreement embodies the give-and-take inherent in organized negotiations between management and employees. Accordingly, in *Department of the Air Force, Air Force Logistics Command, Wright Patterson Air Force Base v. Federal Labor Relations Authority*,[9] the court upheld as negotiable a union proposal requiring that the union be permitted to participate in negotiations over last-chance agreements.

Equal Employment Opportunity Note

Title VII Back Pay Is Taxable

In *Sparrow v. Commissioner of Internal Revenue*,[10] the Court of Appeals for the District of Columbia held that back pay awarded in settlement of a racial discrimination claim under Title VII[11] is not excluded from the recipient's taxable income as damages received on account of personal injury. The court specifically rejected the reasoning expressed in *Burke v. United States*,[12] in which the Sixth Circuit held that damages awarded under Title VII are not taxable because the injury they redress—discrimination—is inherently tortious. The *Sparrow* court averred that the overwhelming consensus among federal appellate courts that Title VII does not provide for damage awards forced the conclusion that settlement monies are taxable.[13] Practitioners should watch for the Supreme Court's decision in *Burke*, which may resolve the issue conclusively.

Civilian Personnel Law Notes

Merit Systems Protection Board Cannot Review Allegations of Discrimination in Performance Rating Under the Whistleblower Protection Act

In *Marren v. Department of Justice*[14] an employee filed an individual right of action (IRA) appeal with the Merit Systems

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[3] 29 U.S.C. §§ 201-219 (1988).

[4] *See* 5 U.S.C. §§ 5342, 5504-5505, 5541-5549, 6101 (1988).

[5] *See* 5 C.F.R. pts. 550-551 (1991).

[6] American Fed'n of Gov't Employees, 37 F.L.R.A. 197 (1990). The FLRA noted that "an employer may be required under the Portal to Portal Act, which amended the FLSA, to provide overtime compensation for a postliminary activity if the requirement stems from . . . a collective bargaining agreement." *Id.* at 211 (citing 29 U.S.C. § 254b (1988)). Accordingly, it interpreted the OPM regulations to provide only that a federal employee has no rights to overtime compensation in the absence of a collective bargaining agreement that specifically entitles the employee to that compensation. *See id.* The overtime proposal was not an attempt to obtain overtime in the absence of an express agreement; therefore, the regulations did not prohibit it. *Id.*

[7] Department of the Air Force v. Federal Labor Relations Auth., 952 F.2d at 451.

[8] *Id.* at 452.

[9] 949 F.2d 475 (D.C. Cir. 1991)

[10] 949 F.2d 434 (D.C. Cir. 1991).

[11] Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 287, 302-17 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-16 (1988)).

[12] 929 F.2d 1119 (6th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3217, 3220-21 (U.S. Oct. 7, 1991) (No. 91-42).

[13] *Sparrow*, 949 F.2d at 438 (implying that only the Third and Sixth Circuits disagree with this premise). *But cf.* Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-37 (providing that federal employees suing under Title VII may recover up to $300,000 in compensatory damages, as well as back pay and other remedial relief); Michael J. Davidson, *The Civil Rights Act of 1991*, The Army Lawyer, Mar. 1992, at 3 (discussing impact of this new provision).

[14] 51 M.S.P.R. 632 (1991).

Protection Board (MSPB or Board), characterizing a marginally successful performance appraisal he had received as retribution for whistleblowing and as handicap discrimination. The administrative judge (AJ) found for the agency. In a case of first impression, the Board reopened the matter to consider whether it had jurisdiction over the handicap discrimination claim.

In a general discussion of the legislative history of the Whistleblower Protection Act (WPA),[15] the MSPB observed that Congress intended the Act to do precisely what its name implies—to protect federal employees from retaliation for whistleblowing.[16] The Board then noted that an employee may pursue an IRA appeal before the Board only after the employee has "exhausted the possibility" of obtaining a remedy through procedures established by the Office of Special Counsel (OSC).[17] Accordingly, the Board found that its own authority to resolve an IRA appeal does not extend beyond the whistleblower issues that concern the OSC.[18] The MSPB concluded that, when it lacks authority separate from the WPA to review the underlying personnel action, it also lacks the authority to decide the merits of an allegation of prohibited discrimination raised in an IRA appeal.[19]

Agency Cannot Seek MSPB Review of Arbitrator's Decision

In another Board jurisdiction case, the MSPB again noted that it does not have universal authority to review arbitration decisions. In *National Federation of Federal Employees*,[20] an agency had removed an employee from his position as a real estate specialist. The employee's union took the matter to arbitration, contending that the employee had been removed because of national origin discrimination and anti-union animus. When the arbitrator ordered the agency to reinstate the employee without back pay, the agency sought MSPB review, asserting that the decision was contrary to law. The Board, however, noted that 5 U.S.C. § 7121(d) limits its scope of review to the appeals of "aggrieved employee[s]" and ruled that neither the union, nor management, had a right to review.[21]

Practice Pointer

Agency's Failure to Object Is a Waiver of Objections to an Accommodation First Raised in Closing Argument

A recent MSPB decision underscored the importance of aggressive advocacy and attention to detail in civil personnel actions. In *Adams v. Department of the Navy*[22] the MSPB reversed the agency's removal of an employee, basing this decision upon the employee's eleventh-hour suggestion on how the agency could have accommodated his physical handicap. The agency had removed the appellant for physical inability to perform his duties as a painter. The appellant suffered from varicose veins, which caused his feet to swell and prevented him from wearing safety shoes. To alleviate this condition, he was placed on medical restrictions that precluded him from prolonged standing. The agency removed the appellant after considering and rejecting the alternatives of reassignment and job restructuring.

Both parties submitted written closing arguments after a hearing in which the issue of accommodation was litigated fully. The appellant suggested in his closing argument an accommodation that neither he, nor his physician, had advanced previously, proposing that the agency could accommodate him by permitting him to take occasional rest breaks.

The appellant had provided no medical evidence at any time during the proceedings to support his assertion that rest breaks would accommodate his physical condition or that they would allow him to perform his duties. The agency actually did not address the appellant's suggested accommodation in its closing argument because the agency did not receive the appellant's closing argument before it had submitted its own. Nevertheless, the AJ reversed the removal. He held that the agency failed to establish by a preponderance of the evidence that the appellant was physically unable to perform the duties of his position and that the agency's failure to accommodate

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[15] Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified as amended at scattered sections of 5 U.S.C.).

[16] *Marren*, 51 M.S.P.R. at 636.

[17] *See id.* at 637 (citing 5 U.S.C. § 1214(a)(3) (1988)).

[18] *Id.*

[19] *Id.* at 638-39. Labor counselors should add the *Marren* analysis to the expanding list of decisions excluding actions from the WPA. *See, e.g.*, Williams v. Department of Defense, 46 M.S.P.R. 549 (1991) (the filing of an Equal Employment Opportunities complaint cannot form the basis of an IRA).

[20] 51 M.S.P.R. 517 (1991).

[21] *Id.* at 518.

[22] 51 M.S.P.R. 276 (1992).

the employee's physical condition by allowing him rest breaks constituted handicap discrimination.

The agency filed a petition for review, based on the appellant's failure to articulate the accommodation in his reply or in his testimony at the hearing. The Board initially denied the agency's petition, finding that it did not meet the criteria for review. Surprisingly, however, it then reopened the case on its own motion and affirmed and modified the AJ's reversal of the removal. The Board held that: (1) an employee's failure to assert a particular reasonable accommodation until closing argument was not fatal to a handicap discrimination claim when the particular accommodation was supported by evidence submitted on the record;[23] and (2) the agency's failure to object to the suggested accommodation, or to the administrative judge's consideration of the employee's argument, constituted a waiver of these objections.[24] The Board noted that the agency easily could have objected to the appellant's attempt to raise an accommodation so late in the proceeding or could have asked the AJ to keep the record open to allow the agency to respond to the appellant's assertions.[25] By neglecting to submit a rebuttal or to preserve an objection to the appellant's closing argument, the agency waived any objection it might have had.[26]

Labor counselors should not assume that an AJ will not consider eleventh-hour accommodation issues or that he or she will ensure that the agency gets an opportunity to respond to them. When, late in the proceedings, an appellant raises new issues relevant to the matter under litigation, the agency should not hesitate to file a rebuttal, an objection, or a motion to reopen before the AJ issues the initial decision. As the Board pointed out in *Adams*, for an administrative judge not to accept and consider an additional rebuttal submission is prejudicial error.[27]

Share This Information with the Rest of the Team

Be sure to pass these Labor and Employment Law Notes to the rest of the labor-management team. Share this information with your civilian personnel officer and your equal employment opportunity officer.

[23] *Id.* at 280. Noting that agency officials had testified that they knew appellant could not stand for longer than two hours at a time, the Board stated that the officials should have known that giving rest breaks would be a reasonable accommodation, even though the employee or his physician never stated this explicitly. *Id.*

[24] *Id.* at 281. The Board emphasized that the agency had ample time to act in the "more than two week period" between the agency's receipt of the appellant's closing argument and the initial decision. *See id.*

[25] *Id.*

[26] *Id.* at 281-82.

[27] *Id.* at 281 (citing Lewis v. Department of the Air Force, 49 M.S.P.R. 442, 444-45 (1991); Anastos v. United States Postal Serv., 38 M.S.P.R. 18, 21-22. (1991)).

Environmental Law Note

OTJAG Environmental Law Division

Army Water Rights and the Judge Advocate

Major Mark S. Graham

> "Water is a strategic resource for the Army. It is essential for industrial processes, military operations, and our installations' quality of life."[1]

Introduction

The importance of sound water resources management should be self-evident. Nevertheless, in a 1988 report, the Army Science Board (Board) castigated the Army for mismanaging its water supplies.[2] The Board provided ample evidence to substantiate its criticism.

In a year-long study of Army installations in the western United States, the Board had examined every aspect of the Army's water supply and management practices. It scrutinized the Army's legal policies, water supply plans, and

[1] Army Science Bd., Dep't of Army, Report of the Ad Hoc Subgroup on Water Supply and Management on Army Installations in the Western United States (1988) [hereinafter Board Report].

[2] *Id.*

research and development needs; it evaluated the management and conservation schemes of individual installations; and it investigated various institutional impediments to effective water resource management.

The Board ultimately found the Army's water management, conservation, and planning efforts inadequate to ensure the availability of fresh water for the Army's western installations.[3] It also opined that the Army had neglected to develop an appropriate legal strategy for dealing with water rights issues. Finally, it concluded that internecine departmental rivalries and inconsistent levels of water management expertise throughout the Army seriously undermined the Army's efforts to administer its water uses. Several institutional deadlocks and technical shortcomings that the Board identified applied specifically to Army legal offices.[4]

The Board advanced several recommendations to correct these deficiencies. It suggested that the Department of the Army: (1) adopt a new policy statement addressing water rights issues and the Army's responsibility to respond to state water laws; (2) adopt a policy that unequivocally defines organizational responsibilities for dealing with legal issues relating to water rights; (3) coordinate with the United States Army Corps of Engineers (USACE) to define the respective organizational roles and responsibilities of the Department of the Army and the USACE in dealing with water law issues; and (4) ensure that its various schools and courses espouse proper water management as an essential element of the Army's long-term mission.[5]

In its report, the Board noted that personnel at many installations had commented on the lack of a clear channel for water rights decisions. It also asserted that many Army attorneys lacked expertise in water law. Consequently, the Board observed that neither an installation's judge advocates, nor the Directorate of Engineering and Housing (DEH) personnel they advised, truly understood the importance of maintaining documents necessary to protect an installation's water rights. These deficiencies were compounded by the lack of a definite Army water policy. The result was a mass of uncertain, personality-specific, ad hoc water rights decisions.[6]

The Board's findings and recommendations spurred the Judge Advocate General's Corps (JAGC) and the USACE to eliminate institutional obstacles to effective legal representation in water law litigation and to increase the water law expertise of attorneys in the field. Accordingly, they jointly sponsored a Water Law Symposium in May 1990[7] and began to research and analyze water policy options for the Army leadership. Their most significant accomplishment, however, was the execution of a memorandum of understanding (MOU) between The Judge Advocate General and the Chief Counsel, USACE.[8] This MOU responds to several of the Board's principal recommendations.

The MOU establishes clear-cut responsibilities for water resource management. The staff judge advocate (SJA) or command legal counsel for each Army installation or activity must advise the command on water law issues in every case that does not involve USACE civil works activities. The MOU, however, anticipates close coordination between judge advocates and USACE counsel. This interaction will allow JAGC attorneys to benefit from the USACE's water law expertise and will ensure that installation water rights decisions do not impede civil work projects.

In accordance with current JAGC policy, installation judge advocates should contact technical experts at their MACOMs or at the Office of The Judge Advocate General (OTJAG) for advice and assistance in water law cases.[9] On issues of Army-wide significance, the MOU mandates close coordination between The Judge Advocate General and the Army General Counsel.

The Army General Counsel and The Judge Advocate General must cooperate closely with the Department of Justice (DOJ) in water law litigations affecting military installations. The USACE Chief Counsel must assist the DOJ in cases pertaining solely to the civil works or real property functions of USACE. In cases involving military installations *and* USACE civil works or real property concerns, DOJ liaison responsibilities will be determined jointly by The Judge Advocate General and the USACE Chief Counsel.

The MOU also addresses the training and expertise shortcomings identified in the Board's report. The Judge Advocate

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[3] *Id.* at 4.

[4] *See id.* at 24-25, 30-31.

[5] *Id.* at 5-6.

[6] *Id.* at 24.

[7] The Water Law Symposium was held in Scottsdale, Arizona, from 14 to 18 May 1990. Over 100 persons attended. The speakers included water law experts from federal agencies, private industries, and academia. The topics included federal and Indian reserved water rights, water adjudication and regulation, and the engineering aspects of water rights.

[8] *See infra* appendix.

[9] *See* Policy Memorandum 91-3, Office of The Judge Advocate General, U.S. Army, subject: Use of Technical Channels of Communication, 30 July 1991.

General and the USACE Chief Counsel agreed to improve their attorneys' water law proficiencies and to conduct joint water law training whenever possible. The Chief Counsel also agreed to update the USACE *Summary of State Water Law*[10]—the third volume of the *Army Water Resources Planning Series for Fixed Army Installations.*[11] This manual now contains a description of water right acquisition procedures and summaries of water law for each of the fifty states.

The requirements for attorneys in the field are clear. Staff judge advocates and other command counsel must develop water rights plans to deal with current and future water law issues at each installation. They also must train personnel to meet these challenges. This article should assist them in developing water law strategies and may serve as a starting point for future analyses of water law issues.

Military Installations and Water Rights

No one "owns" water—at least, not in the sense that one owns real estate. A water right involves only the right to *use* water. Consequently, the rules governing the use and acquisition of water have evolved into a body of law whose principles are distinct from the concepts of traditional property law.

A federal installation can obtain water rights in a number of ways. A water right may be purchased or taken through eminent domain, much like an interest in real property. It also may be obtained or appropriated under state law or by operation of the federal reserved rights doctrine.[12]

Theoretically, a federal activity also could assert a water right through the operation of the preemption doctrine. This concept, sometimes called the federal "nonreserved" water rights doctrine, derives from the apparent authority of the federal government to achieve an authorized constitutional or statutory objective by preempting state water rights acquisition procedures. The government arguably could resort to this doctrine if a federal agency somehow neglected to reserve or to acquire an essential federal water right when it obtained land for a federal facility. It also could use the doctrine if the purpose for which the land was reserved does not encompass another legitimate purpose for which water is needed—for example, when water is necessary to maintain a wildlife preserve on a military installation. For reasons of legal policy, however, the Department of Justice has declined to recognize a preemptive, federal, nonreserved water right.[13]

As it applies to the military, water law necessarily comprises components of both federal and state law. Accordingly, judge advocates should strive to understand not only the federal water rights doctrine, but also the substantive and procedural water laws of the states in which their installations are located.

Traditional Water Law Doctrines—Riparian Rights and Prior Appropriation

As a general rule, each of the fifty states follows one of three water law doctrines. The water-rich eastern states adhere primarily to the "riparian" system. In states west of the 100th meridian, where rainfall rarely exceeds twenty inches per year, the "prior appropriation" doctrine of "first-in-time, first-in-right" prevails.[14] A hybrid system that mingles riparian and prior appropriation principles is found along the 100th meridian from Texas to North Dakota and in the states of the Pacific Coast.[15] The general principles governing the major systems and the hybrid system are summarized below. Each judge advocate, however, must consult local statutes and case law to understand the system that affects his or her installation.

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[10] Engineer Inst. for Water Resources, U.S. Army Corps of Engineers, Summary of State Water Law (1991).

[11] Engineer Inst. for Water Resources, U.S. Army Corps of Engineers, Water Resource Planning Series for Fixed Army Installations (1991). This series was developed for USACE under a contract with Planning and Management Consultants, Ltd. It comprises three separate volumes, respectively titled: (1) Installation Planning Manual: Water Resources Strategy and Planning Principles; (2) Installation Water Resources Analysis and Planning System (IWRAPS); and (3) Summary of State Water Laws. It is designed to aid Army installation water planners to develop water supply management plans and to promulgate new planning methodologies in accordance with the recommendations of the Army Science Board. *See generally* Board Report, *supra* note 1, at 5.

[12] The reserved rights doctrine is a judicial creation that assures that lands withdrawn from the public domain for federal purposes have adequate water to carry out the purposes for which they were reserved. The Supreme Court first announced the doctrine in an Indian water rights case. *See United States v. Winters*, 207 U.S. 564 (1908) (applying the doctrine to guarantee that Indian lands set aside as reservations by the United States Government would have adequate water). See generally *infra* notes 21-23, 26 and accompanying text for an analysis of the reserved right doctrine and its application to other federal reservations.

[13] *See generally* Memorandum, Office of the Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice, subject: Federal Non-Reserved Water Rights, 16 July 1982. After conducting an exhaustive legal review, the Office of Legal Counsel refused to assert that a presumption exists in favor of federal nonreserved rights. Unless a federal agency holds reserved water rights, federal agencies may acquire water only pursuant to state law, absent evidence that Congress specifically intended to preempt state laws. *Id.* at 79-80. The Supreme Court never has addressed this issue specifically.

[14] The prior appropriation states are Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. *See* David H. Getches, Water Law 6 (2d ed. 1990).

[15] The states that combine features of the prior appropriation doctrine with provisions accommodating preexisting riparian rights are California, Kansas, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington. *See id.* at 7.

Riparian Rights

Under the riparian doctrine, all landowners whose property abuts a stream or body of water have equal rights to use water from that source. Generally, a riparian landowner must use the water for reasonable purposes within the watershed from which it is taken.[16] A landowner may draw water from a source as it passes through his or her property, but he or she may not divert it unreasonably and must return it to the stream from which it is obtained.[17]

Only rarely must military installations in the eastern United States cope with inadequate water supplies. Many eastern states, however, have implemented statutory regimes affecting the riparian rights of landowners. Some have established elaborate permit programs to regulate water uses.[18] Judge advocates serving in the eastern states must understand these regimes and the impacts they may have on an installation's water uses.

Prior Appropriation

The prior appropriation doctrine grew out of the development needs of the old West. Traditionally, a water appropriator simply took and used whatever water was available. To gain legal recognition of the appropriation, however, the appropriator had to demonstrate that he or she formed an intent to appropriate the water and then diverted the water and applied it to a beneficial use.[19]

To protect his or her water right against other claimants, an appropriator must establish a priority date. Customarily, an appropriator's priority was determined by the date that he or she first took steps to divert the water. Many states, however, have substituted compliance with permit requirements for the requisite intent to divert as the key element for establishing the priority of a use.[20] In these states, the date an appropriator applies for a water use permit becomes his or her priority date if he or she later exercises due diligence in developing the water source for a beneficial use.

The priority date is the central feature of the prior appropriation doctrine. When not enough water is available for all appropriators, a senior appropriator may exercise his or her water right in full before a junior appropriator may use any water.

Federal Reserved Water Rights

The doctrine of reserved rights recognizes the implied intent of the federal government to reserve unappropriated water for federal activities when it withdraws land for those activities from the public domain.[21] The Supreme Court observed in *United States v. New Mexico* that "where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude . . . that the United States intended to reserve the necessary water."[22] A reserved water right affects only the amount of water necessary to fulfill the reservation's specific purpose; however, it encompasses not only the reservation's present needs, but also its future requirements.[23]

Judge advocates must recognize the substantial impact that the reserved water rights doctrine may have on water law regimes in prior appropriation states. The doctrine can create substantial uncertainty about the value of an appropriator's water right under state law. For example, the priority date of a federal reserved water right is the date that the federal government withdraws the reserved land from the public domain—*not* the date that the reservation first diverts water or obtains a state permit. Moreover, a federal reserved water right, unlike a prior appropriation right, cannot be lost through disuse. Accordingly, the reservation may claim seniority over other water users even though it never previously diverted water from a particular source.

Additional uncertainties may arise because the present and future water needs of a federal reservation cannot be quantified easily. Other users often cannot estimate how much water the reservation may claim. The reserved rights doctrine aggravates these uncertainties by permitting the reservation to claim any amount it deems necessary without regard to state law or regulation.

Finally, the beneficial uses enumerated in state law may not include the purposes of the federal reservation. Arguably, this may blind water users to the possibility that the reservation may assert a valid water right in a particular source.

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[16] *See* Stratton v. Mount Hermon Boys Sch., 103 N.E. 87 (Mass. 1913) (nonriparian uses).

[17] *See* 1 Water and Water Rights § 16.1 (R. Clark ed. 1967).

[18] See George W. Sherk, *Eastern Water Law: Trends in State Legislation*, 9 Va. Envtl. L.J. 288 (1990), for an excellent review of eastern water law trends. At present, eastern states generally favor increases, rather than decreases, in state regulation of water uses.

[19] Charles J. Meyers et al., Water Resource Management 262 (3d ed. 1988).

[20] *See* Sand Point Water & Light Co. v. Panhandle Dev. Co., 83 P. 347 (Idaho 1905).

[21] In 1963, the Supreme Court extended the reserved rights doctrine to non-Indian federal reservations. *See* Arizona v. California, 373 U.S. 546, 601 (1963); *see also* Cappaert v. United States, 426 U.S. 128, 138 (1976).

[22] 438 U.S. 696, 702 (1978).

[23] Arizona v. California, 373 U.S. at 600.

The confusion caused by the interplay of federal reserved water rights and the prior appropriation doctrine is compounded by the political, social, and economic needs of the western states. The dramatic legal effects of a military reserved water right can disrupt an installation's good relations with its neighbors—especially when the installation casually asserts the right to flout conflicting claims advanced under state law. Although Army attorneys occasionally must assert an activity's federal water rights to protect command interests, they normally should try to do so with sensitivity and tact.

Groundwater Law

Water law practice is complicated further by state groundwater laws, which may or may not complement the surface state's water regime.[24] When groundwater law first evolved in England, the hydrological connection between groundwater and surface water was not understood. Accordingly, the English, or "absolute ownership," rule placed no restrictions on a landowner's right to pump water from the ground beneath his or her property. A landowner could draw off any amount of water without regard to the impact of the pumping on surrounding landowners and users.[25]

The states that inherited the English rule when America declared its independence gradually discovered the rule's logical inconsistencies. Consequently, three conflicting doctrines, each rejecting the harshness of the absolute ownership concept, eventually supplanted the English rule in the United States. The "American," or "reasonable use," rule requires that a landowner's use of groundwater use be reasonable. It also provides that all groundwater must be used for a beneficial purpose on the overlying land. Use of groundwater on other lands and malicious pumping is prohibited as unreasonable. Another doctrine, that of "correlative rights," allows all landowners to use a reasonable share of a total groundwater supply. This doctrine also permits landowners whose properties do not overlie a groundwater source to pump water from the source if surplus water exists and if the source's annual yield is regulated to ensure that it is not exhausted through overuse. Finally, some western states have applied the prior appropriation doctrine to groundwater uses.

Groundwater pumping generally is regulated through permits. Some states also integrate groundwater administration with their controls on surface water rights. A landowner normally must establish his or her priority date, or must prove his or her reasonable use of groundwater, to obtain a permit from state water officials.

An installation that relies on a groundwater source can assert its federal reserved water rights in that source.[26] The legal issues relevant to groundwater use do not differ significantly from surface water issues. Even so, a judge advocate should study the interplay between state surface and groundwater law and the federal reserved water rights doctrine carefully before advising a commander to draw on a ground-water source.

Water Rights Adjudication

Three kinds of water rights adjudications can affect the water rights of a military installation: (1) lawsuits between two or more water users; (2) general stream adjudications; and (3) judicial reviews of administrative agency decisions on water rights permits.

A lawsuit between several—but not all—users of a particular water source normally proceeds like any other legal action. A suit of this sort usually is initiated by private parties, although a state may be involved. The decree is binding only on the parties to the suit.

A military installation normally would not involve itself in a state water rights adjudication unless the installation holds water rights under state law. That this situation could arise is not inconceivable; an installation's water right easily could be purchased, transferred, or otherwise acquired under state law. Federal law, however, governs federal reserved water rights. Accordingly, those rights are not dependent upon state law or procedures.[27]

A state can administer federal reserved water rights pursuant to a limited waiver of sovereign immunity found in the McCarran Amendment.[28] The McCarran Amendment partially waives federal sovereign immunity from state suits for the adjudication or the administration of water rights by

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[24] *See generally* J. David Aiken, *Nebraska Ground Water Law and Administration*, 59 Neb. L. Rev. 917, 920-942 (1980) (providing a useful overview of ground water law systems); Getches, *supra* note 14, at 252-254.

[25] *See, e.g.*, Findley v. Teeter Stone, Inc., 248 A.2d. 106 (Md. 1968) (unlimited pumping caused sink holes on a neighboring farm).

[26] *Cappaert*, 426 U.S. at 143.

[27] *Id.* at 145.

[28] 43 U.S.C. § 666 (1988). The McCarran Amendment specifically provides:

(a) Joinder of the United States as defendant; costs

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amendable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided* that no judgment for costs shall be entered against the United States in any such suit.

(b) Service of summons

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State

Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court involving the right of States to the use of water of any interstate stream.

Id.

authorizing the joinder of the United States in "general stream adjudications." To meet the standards of the amendment, a suit must concern an entire river system or other source[29] and must "involv[e] a general adjudication of 'all the rights of [the] various owners on . . . [the] stream,'"[30] so that the court may consider "the entire community of claims . . . ."[31]

Because an installation's reserved water rights derive from federal law, they cannot be extinguished in a general stream adjudication before a state court. The court, however, may require the United States to quantify, assert, and define its federal water rights.

A general stream adjudication can be extremely complex and may involve thousands of claims and parties. It binds all water users, including the United States, and subjects them to state administration. The filing of claims and objections—and the trial itself—may continue for years.

The waiver of sovereign immunity in general stream adjudications is sensible, however, because it allows states to quantify federal reserved water uses and to influence the management of water resources on federal reservations. This power is especially important in prior appropriation states, where federal reserved water rights frequently cause widespread uncertainty.

A general stream adjudication must be distinguished from a third type of water rights adjudication: a state administrative proceeding. Administrative proceedings typically are conducted before a state administrative body or the state's chief water engineer. All water users who draw on a particular water source normally must apply for permits. The administrative body ultimately issues an order establishing beneficial uses, quantities of use, priority dates, and restrictions on users. This order may be appealed to a specified state court.

An administrative proceeding is not a general stream adjudication as defined by the McCarran Amendment. Accordingly, a military installation cannot be compelled to participate in a state administrative process unless it holds a water right under state law. Nevertheless, an installation may choose to participate as a matter of comity, especially if it anticipates the commencement of a general stream adjudication in state court. By providing information at the request of a state agency, the installation might foreclose procedural or substantive issues that otherwise would arise in future litigation. For example, at a general stream adjudication, the Army could defend its prior noncompliance with state permit requirements by showing that it previously provided equivalent information to the state.

Actions That Judge Advocates Should Take

So complex is substantive water law that a command may forfeit its water rights through simple inattention. To avoid the severe mission impact of this loss, Army attorneys must develop plans to preserve Army water rights for each installation or facility.

A judge advocate should inquire into the status of the installation's water rights. He or she must obtain answers to the following questions:

- Who owns or controls the installation's water rights?
- If the installation owns or controls its water rights, how are these rights documented and where are the documents maintained?
- Are the installation's historical and current uses documented? What other methods of proof are available? Are these uses considered "beneficial" under state law?
- Have any other water users challenged the installation's water rights? Has the installation identified any significant competing interests offpost?
- If anyone were to challenge the installation's rights, who would defend the installation's interests?
- Are any challenges anticipated?
- Has the installation planned for contingencies—such as drought, mobilization, new projects, or future mission requirements—that may increase its demand for water?
- Are the DEH and the SJA coordinating on water rights issues?
- Has the installation developed a joint water law strategy with other Army or Defense Department installations in the state?
- What specialized expertise or training can DEH and SJA personnel bring to bear in water planning and water rights matters? Is further training warranted?

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[29] *Id.* § 666(a)(1).

[30] Dugan v. Rank, 372 U.S. 609, 618 (1963).

[31] United States v. District Court, 401 U.S. 520, 524 (1971).

The answers to these questions should reveal the strengths and weaknesses of the installation's water program and should guide the judge advocate in developing a water rights protection plan. Lines of communication between the DEH and the SJA's office should be established and maintained. Most significantly, the installation should control and should maintain water rights documentation properly in anticipation of potential adjudications.

The judge advocate and a DEH representative should meet state water regulators and officials. They can obtain valuable information about local water issues from these contacts and local officials will appreciate the military's efforts to create and maintain positive relations with the civilian community.

Once the installation's legal strategy is developed, it should be documented and reviewed periodically. Army attorneys should conduct special reviews whenever they foresee the occurrence of a significant event, such as a partial closure, a change in mission, or a change in mission elements or tenants.

Resources Available to Staff Judge Advocates

A staff judge advocate's first contact for assistance in water law matters should be the technical chain of communication. Major command attorneys can draw on extensive resources and experience to assist judge advocates in the field and the OTJAG Environmental Law Division has designated an officer specifically to provide installation judge advocates with technical expertise and litigation support in water law cases. Moreover, judge advocates should not forget the MOU between The Judge Advocate General and the USACE Chief Counsel. By collaborating with USACE district counsel, installation judge advocates can gain invaluable assistance. The installation DEH also has a wide range of expertise and technical support at its disposal. For example, the Army Corps of Engineer's Institute for Water Resources has developed a water supply and demand forecasting model to predict the winter and summer water needs of Army installations.[32] This model should be a valuable tool for overall planning or for use in adjudications.

Conclusion

The need to manage water resources carefully will not go away. Future development will tax the supply of water seriously. State authorities will look for water wherever it can be found. Water truly is a strategic resource and the Army must be ready to meet its future water requirements. Any judge advocate that wishes to play an effective role in this process must prepare for that role now.

Appendix

MEMORANDUM OF UNDERSTANDING BETWEEN THE JUDGE ADVOCATE GENERAL, UNITED STATES ARMY AND THE CHIEF COUNSEL, UNITED STATES ARMY CORPS OF ENGINEERS

1. *Purpose.* This Memorandum of Understanding (MOU) establishes policies, procedures and responsibilities for the rendering of legal advice to and representation of United States Army military installations and activities on issues and at proceedings relevant to the availability and allocation of surface and ground water.

2. *Applicability.* This MOU applies to all U.S. Army military installations and activities in the Continental United States, Alaska, and Hawaii. It is intended that the terms military installations and activities be construed broadly and include, at a minimum, all real estate owned or controlled by the Department of the Army or its subordinate commands for military purposes. This MOU does not apply to water law issues relating solely to Civil Works projects and activities of the U.S. Army Corps of Engineers, which will continue to be handled by attorneys under the technical supervision of the Chief Counsel, U.S. Army Corps of Engineers.

3. *Effective Date and Duration.* This MOU is effective on the date it is signed by the parties hereto. This MOU will continue to be in effect until revoked, or modified, in writing, by either of the parties hereto.

4. *Understanding:* It is understood as follows:

a. Attorneys in the Office of The Judge Advocate General, the Office of the Chief Counsel, and attorneys at field elements under the technical supervision of The Judge Advocate General and the Chief Counsel, will work in a cooperative manner on legal issues and proceedings concerning the availability and allocation of surface and ground water for the Army installations and activities subject to this MOU. The Judge Advocate General and the Chief Counsel will encourage the attorneys under their respective technical supervision to cooperate with one another to the fullest extent possible in order to ensure that the Army receives the most timely and best possible legal advice and representation on water rights and related issues.

b. The Judge Advocate General and the Chief Counsel will ensure that adequate training is provided to the attorneys under their respective technical supervision on the law of

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[32] *See generally* Engineer Inst. for Water Resources, U.S. Army Corps of Eng'rs, Installation Water Resources Analysis and Planning System (IWRAPS) (1991). The model uses a computer program to forecast water needs. For more information concerning the model, contact the Institute for Water Resources, U.S. Army Corps of Engineers, Fort Belvoir, VA.

water rights. They will coordinate this training and conduct joint training sessions, when possible, to ensure maximum participation by JAG Corps and Corps of Engineers and Army Materiel Command (AMC) attorneys.

c. The installation or activity staff judge advocate (SJA), chief legal advisor or counsel is responsible for rendering advice to the installation or activity Commander and providing representation where appropriate regarding the legal issues pertaining to the availability and allocation of surface and ground water, and the establishment and protection of rights to water, for that installation or activity. The installation or activity SJA, chief legal advisor or counsel will render such advice and representation subject to technical channel supervision of The Judge Advocate General and appropriate MACOM staff judge advocate or command counsel, including the Command Counsel, HQs, AMC. Upon request of The Judge Advocate General, the Chief Counsel will assist The Judge Advocate General and the installation or activity SJA, chief legal advisor or counsel in carrying out these responsibilities. The Chief Counsel will also provide that attorneys at Corps division and district offices may be available to assist the installation or activity SJA, chief legal advisor or counsel in carrying out these responsibilities. The installation or activity SJA, chief legal advisor or counsel shall keep the appropriate Corps division or district counsel informed of significant water law and water rights issues facing the installation or activity.

d. The Judge Advocate General shall provide legal advice to the Army Staff regarding the availability and allocation of surface and ground water for Army installations and activities subject to this MOU. In addition, The Judge Advocate General will exercise appropriate technical channel supervision and communication, in coordination with the appropriate MACOM staff judge advocate or command counsel, regarding installation water law issues. The Judge Advocate General will obtain the views and comments of the Chief Counsel, USACE, before taking any position that may affect or set a precedent that may affect any civil works projects or activities and will invite the Chief Counsel to participate in discussions regarding such water law issues.

e. Consistent with the Army General Counsel's role as provided in General Order 17, The Judge Advocate General will coordinate with the General Counsel regarding any installation water law issues or questions that involve significant departmental concerns; departmental legal policies and precedents; and matters of interest to the General Counsel or members of the Office of the Secretary. In determining the final Army position or legal policy on such matters, the General Counsel may coordinate with the Chief Counsel regarding departmental positions on installation water law issues that may affect civil works projects or activities.

f. Consistent with AR 27-40, para. 1-4, and subject to the authority of the Army General Counsel, The Judge Advocate General will maintain direct liaison with the Department of Justice (DOJ) on litigation concerning the availability and allocation of surface and ground water and the establishment and protection of water rights for Army military installations and activities (including state adjudications under the McCarran Amendment, 43 U.S.C. § 666). Further, with respect to any general judicial adjudication subject to this MOU which could affect the civil works or real property functions of the U.S. Army Corps of Engineers, The Judge Advocate General and the Chief Counsel will jointly determine which office should maintain primary direct liaison with the Department of Justice, and will scope and execute appropriate coordination with each other and with the General Counsel with respect to that litigation.

g. The Chief Counsel agrees to be responsible for the task of providing a periodic update of: (1) the description of the administrative procedures related to water rights in the 50 states; (2) the summary of water law in each of the 50 states; and (3) the status of general stream adjudications; all of which are contained in the Department of the Army *Water Resources Planning Manual for Fixed Army Installations* which is to be finalized during 1991.

h. The Judge Advocate General and the Chief Counsel will meet periodically to exchange information on recent developments, and to identify any special needs or concerns relating to Army water rights issues involving military installations.

i. Appropriate provisions of this MOU will be placed in applicable Army regulations.

John L. Fugh	Lester Edelman
The Judge Advocate General	Chief Counsel

Date: October 21, 1991

Professional Responsibility Notes

OTJAG Standards of Conduct Office

Army Regulation 27-26: Rules of Professional Conduct for All Army Lawyers

In the summer of 1990, the Secretary of the Army directed a study of Army legal services. As an offshoot of this investigation, he directed the Army General Counsel to consider establishing rules of professional conduct for all Army lawyers. The Army's four "senior counsel"—the General Counsel, The Judge Advocate General, the Command Counsel of the Army Materiel Command, and the Chief

counsel of the Corps of Engineers—directed their deputies to act as an executive committee and appointed a working committee under the chairmanship of Mr. Ernest Willcher of the General Counsel's Office.

As bases for the new rules, the working committee decided to use the existing Army Rules of Professional Conduct for Lawyers, which presently govern the conduct of lawyers under the jurisdiction of The Judge Advocate General.[1] The committee members then proposed a number of changes to these rules. For example, they clarified the provision in Rule 1.5 governing compensation for performance of official duties; they changed Rule 1.13 to prohibit more explicitly the formation of an attorney-client relationship in the absence of specific authorization to do so and to require an attorney to disclose to a client the attorney's duty to report the client's intentions to act unlawfully; and they expanded Rule 8.1 to cover applications for Federal employment.

The committee substantially changed Army Rule 8.5,[2] expanding it to address in more detail the relationship between the Army Rules and "civilian" rules. As amended, Rule 8.5 provides that, in a conflict between the Army Rules and the rules of an Army lawyer's licensing jurisdiction, the lawyer first must attempt to resolve the conflict with the assistance of a supervising attorney. If a resolution cannot be reached, the Army Rules will govern the lawyer's conduct in the performance of his or her official duties and the rules of the licensing authority will govern the lawyer's conduct in matters relating to the private practice of law outside the attorney's official duties.

The working committee addressed the issues of enforcement and interpretation in two new rules. Rule 9.1, *Interpretation*, establishes a Department of the Army (DA) Professional Conduct Council. This council, which will be composed of the four senior counsel or their designated representatives, will provide authoritative interpretations of the Army Rules of Professional Conduct. Each senior counsel will be assisted by a professional responsibility committee (PRC) in reviewing and resolving rule interpretations. Requests for official interpretations must be submitted through the technical chain of supervision. Each ultimately will be referred to the senior counsel's PRC. The DA council will not render disciplinary opinions, although a senior counsel may use the council's opinions as the basis for disciplinary actions.

Rule 10.1, *Enforcement*, requires each senior counsel to establish a procedure for enforcing the Army Rules with respect to attorneys under his or her supervision. It also provides that the General Counsel will inquire into allegations of professional impropriety lodged against any other senior counsel and that the Secretary of the Army will inquire into any allegation against the General Counsel.

The Army Rules will be published in regulatory form. To preserve the existing numbering scheme—which matches the American Bar Association Model Rules and permits easy cross referencing—the Army Rules are contained in an appendix to the new Army regulation. The regulation does not afford the Army Rules the status of a punitive regulation, as contemplated in Uniform Code of Military Justice (UCMJ) article 92.[3] Instead, the rules will be enforced through the use of normal administrative sanctions. The regulation, however, does not preclude UCMJ action if an act that violates an Army Rule also is an offense under an independent provision of the UCMJ. Any local provisions that would supplement the regulation must be approved expressly by the General Counsel. Finally, the regulation will continue the number of the existing DA pamphlet, bearing the designation Army Regulation 27-26. According to the editor at the Army Publications and Printing Command, the regulation was scheduled for publication in mid-April 1992, which means it will become effective in mid-May 1992. Colonel Lane.

Ethical Awareness

The following case summary, which describes the application of the Army's Rules of Professional Conduct for Lawyers[4] to an actual professional responsibility case, may serve not only as a precedent for future cases, but also as a training vehicle for Army lawyers, regardless of their levels of experience, as they ponder difficult issues of professional discretion.

To stress education and to protect privacy, neither the identity of the office, nor the name of the subject involved in the case study will be published. Mr. Eveland.

Case Summary

Army Rule 1.6
(Confidentiality of Information)
Army Rule 4.4
(Respect for the Rights of Third Persons)

An attorney who inadvertently revealed that a client's husband had spent the night with another woman after the client expressly requested the attorney not to disclose this information breached the ethical rule of confidentiality, even though this disclosure actually may have furthered the client's cause.

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[1] *See* Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers (31 Dec. 1207) [hereinafter DA Pam. 27-26].

[2] *See* DA Pam. 27-26, Rule 8.5 (discussing jurisdictional limits of the Army Rules of Professional Conduct and of comparable state rules).

[3] Uniform Code of Military Justice art. 92, 10 U.S.C. § 892 (1988).

[4] *See generally* DA Pam. 27-26.

The wife of an Army officer consulted an Army legal assistance attorney (LAA), seeking help in obtaining delinquent support payments. The client confided that her husband, Captain *N*, had spent the night with Captain *H*, a female officer in the husband's unit. Out of concern for her husband's military career, however, the wife instructed the LAA not to divulge this information.

The LAA phoned Major *B*, Captain *N*'s commander, and asked him to counsel Captain *N* about his support obligations. Major *B*, recalling Mrs. *N*'s rumored promiscuity, took the side of his soldier and became argumentative. Major *B* declared that he had "confidential" information about marital infidelity and asked the LAA if he was aware of it. Without thinking, the LAA responded that the only rumor of infidelity of which he was aware was that Captain *N* may have spent the night at the home of Captain *H*. Within thirty minutes of this conversation, Major *B* called the LAA to report that he had discussed the matter with Captain *N* and that Captain *N* would pay the support. The LAA then asked Major *B* not to use the allegation of marital infidelity against the parties, explaining that he had mentioned the incident only in response to the major's question, in what he believed to be a confidential conversation.

Army Rule 1.6 prohibits lawyers from "revealing information relating to representation of a client unless the client consents after consultation."[5] The rule recognizes three limited exceptions to this prohibition—among them, that an attorney may make "impliedly authorized" disclosures that are necessary to carry out the representation.[6]

Although the rule implicitly authorizes LAAs to disclose appropriate client information,[7] in this case, Mrs. *N* forbade the LAA to use the private information. Accordingly, the LAA's inadvertent revelation about Captain *N* and Captain *H* violated Army Rule 1.6. The LAA, however, did not disclose the information to harm Captain *N* or Captain *H*. Moreover, the disclosure did not prejudice anyone's legal rights or standing. Therefore, the disclosure did not violate Army Rule 4.4.[8]

The LAA's staff judge advocate counselled him, then obtained The Judge Advocate General's approval to close the case. The following mitigating factors strongly influenced the final decision:

- The case had no complainant. The LAA reported the violation himself when he realized that he had violated his client's confidence.
- The LAA had been in the Army for approximately six months when the incident occurred. He otherwise had performed his legal assistance duties in an extremely capable fashion. This lapse in professional judgment was not characteristic of his overall performance.
- The disclosure of information legally did not prejudice the LAA's client, and actually may have furthered her cause.

Mr. Eveland.

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[5] DA Pam. 27-26, Rule 1.6 (a).

[6] *See id.* Rule 1.6 provides:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
>
> (b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system.
>
> (c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Id. See generally Geoffrey C. Hazard, Jr. & Susan P. Koniak, *The Law and Ethics of Lawyering* 105-327 (1990).

> The law governing client confidences has two sources: – agency law and the law or evidence. Lawyers like all agents have a duty to treat information from and about their principals as confidential to the extent that it is intended to be so by the principal .... This duty continues even after the agency is terminated.

Id. at 185.

[7] "A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority." DA Pam. 27-26, Rule 1.6 comment.

[8] *Id.*, Rule 4.4 (Respect for Rights of Third Persons).

Personnel, Plans, and Training Office Note

Personnel, Plans, and Training Office, OTJAG

Army Lawyer Placement

On 15 January 1992, The Judge Advocate General established the Army Lawyer Placement service to support the Army Career Alumni Program (ACAP) during the Army drawdown. The Army Lawyer Placement service will help eligible judge advocates and warrant officers to identify, to prepare for, and to obtain professional employment in the civilian sector in private practice and in local, state, and federal governments.

A judge advocate or warrant officer may take advantage of this service if he or she is eligible to retire, has served at least two years in his or her present grade, and has been nonselected for promotion or for conditional voluntary indefinite or voluntary indefinite status. Officers in a promotable status are ineligible for assistance.

The Army Lawyer Placement service will provide eligible officers with job search information materials, will help them to identify employment prospects, and will assist them in preparing for employment interviews. An officer seeking this assistance should prepare a resume. He or she also should complete Standard Form 171 if he or she is interested in federal employment. Moreover, the officer should relate the following information to Army Legal Placement or ACAP personnel:

- his or her employment availability date;
- his or her geographic employment preference (reflecting current state bar membership or the ability to "waive into" a state bar);
- his or her interest in state or federal employment;
- his or her legal specialty skills, such as civil litigation, contracts, environmental law, or criminal law;
- his or her unique qualifications, such as proficiency in a foreign language, prior service experience, or nonlegal technical skills; and
- his or her special family needs, such as proximity to a military medical center or availability of special services.

Officers interested in obtaining outplacement employment services should enroll in the Army Career Alumni Program. An ACAP office may be found on most major Army installations. After enrolling in the ACAP, officers are encouraged to contact Lieutenant Colonel Greg Huckabee, Army Lawyer Placement, Personnel, Plans, and Training Office, OTJAG, for further assistance at (703) 695-8366/1353 or DSN 225-8366/1353.

All members of the Regiment should join in the placement effort. Anyone with information about potential positions in the civilian employment sector is encouraged to contact Army Lawyer Placement. We now must provide to one another the special support that we, as a corps, long have provided so abundantly to the rest of the Army.

Information Management Office Note

OTJAG Information Management Office

LAAWS Bulletin Board Service

The Legal Automated Army-Wide System (LAAWS) operates a bulletin board service (BBS) dedicated to serving the Army legal community and certain approved Department of Defense (DOD) agencies. A note describing the LAAWS BBS has appeared as a regular feature in past editions of *The Army Lawyer*. The inquiries that this note has inspired demonstrate a need to clarify the nature of the BBS.

The LAAWS BBS is the successor to the OTJAG BBS, formerly operated by the OTJAG Information Management Office. Access to the LAAWS BBS currently is restricted to the following individuals:

- Active duty Army judge advocates;
- Civilian attorneys employed by the Department of the Army;
- Army Reserve judge advocates presently serving on active duty, or employed full-time by the federal government;

- Active duty Army legal administrators, non-commissioned officers, and court-reporters;
- Civilian legal support staff employed by the Judge Advocate General's Corps;
- Military and civilian attorneys employed by certain supported DOD agencies—for example, the Defense Logistics Agency or the Civilian Health and Medical Program of the Uniformed Services;
- Individuals with approved, written exceptions to policy.

Requests for exceptions to the access policy should be submitted to:

Headquarters, Department of the Army
ATTN: DAJA-IM
(LAAWS Project Management Officer)
The Pentagon
Washington, DC 20310-2200

The following is an updated list of TJAGSA publications available for downloading from the LAAWS BBS. (Note that the date a publication is "uploaded" is the month and year the file was made available on the BBS—the publication date is available within each publication.)

FILE NAME	UPLOADED	DESCRIPTION
121CAC.ZIP	June 1990	The April 1990 Contract Law Deskbook from the 121st Contract Attorneys' Course
1990-YIR.ZIP	January 1991	1990 Contract Law Year in Review in ASCII format. It originally was provided at the 1991 Government Contract Law Symposium at TJAGSA.
1991-YIR.ZIP	January 1992	TJAGSA Contract Law 1991 Year in Review.
505-1.ZIP	February 1992	TJAGSA Contract Law Deskbook, vol. 1, May 1991
505-2.ZIP	February 1992	TJAGSA Contract Law Deskbook, vol. 2, May 1991
506.ZIP	November 1991	TJAGSA Fiscal Law Deskbook, November 1991
ALAW.ZIP	June 1990	The Army Lawyer/ Military Law Review Database (Enable 2.15). Updated through1989 The Army Lawyer Index, it includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
CCLR.ZIP	September 1990	Contract Claims, Litigation, Litigation, & Remedies
FISCALBK.ZIP	November 1990	The November 1990 Fiscal Law Deskbook
JA200A.ZIP	March 1992	Defensive Federal Litigation, vol. 1
JA200B.ZIP	March 1992	Defensive Federal Litigation,vol. 2
JA210.ZIP	March 1992	Law of Federal Employment
JA211.ZIP	March 1992	Law of Federal Labor-Management Relations
JA231.ZIP	March 1992	Reports of Survey and Line of Duty Determinations—Programmed Text
JA235.ZIP	March 1992	Government Information Practices
JA240PT1.ZIP	May 1990	Claims—Programmed Text, vol. 1
JA240PT2.ZIP	May 1990	Claims— Programmed Text, vol. 2
JA241.ZIP	March 1992	Federal Tort Claims Act
JA260.ZIP	May 1990	Soldier's and Sailor's Civil Relief Act Pamphlet
JA261.ZIP	March 1992	Legal Assistance Real Property Guide
JA262.ZIP	March 1992	Legal Assistance Wills Guide
JA263A.ZIP	May 1990	Legal Assistance Family Law
JA265A.ZIP	May 1990	Legal Assistance Consumer Law Guide (1/3)

FILE NAME	UPLOADED	DESCRIPTION
JA265B.ZIP	May 1990	Legal Assistance Consumer Law Guide (2/3)
JA265C.ZIP	May 1990	Legal Assistance Consumer Law Guide (3/3)
JA267.ZIP	March 1992	Legal Assistance Office Directory
JA268.ZIP	March 1992	Legal Assistance Notarial Guide
JA269.ZIP	March 1992	Federal Tax Information Series
JA271.ZIP	March 1992	Legal Assistance Office Administration Guide
JA272.ZIP	March 1992	Legal Assistance Deployment Guide
JA273.ZIP	March 1992	Legal Assistance Living Wills Guide
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act —Outline and References
JA275.ZIP	March 1992	Model Tax Assistance Program
JA276.ZIP	March 1992	Preventive Law Series
JA285.ZIP	March 1992	Senior Officers' Legal Orientation
JA290.ZIP	March 1992	SJA Office Manager's Handbook
JA296A.ZIP	May 1990	Administrative and Civil Law Handbook (1/6)
JA296B.ZIP	May 1990	Administrative and Civil Law Handbook (2/6)
JA296C.ZIP	May 1990	Administrative and Civil Law handbook (3/6)
JA296D.ZIP	May 1990	Administrative and Civil Law Handbook (4/6)
JA296F.ARC	April 1990	Administrative and Civil Law Handbook (6/6)
JA301.ZIP	October 1991	Unauthorized Absence—Programmed Instruction, TJAGSA Criminal Law Division
JA310.ZIP	October 1991	Trial Counsel and Defense Counsel Handbook, TJAGSA Criminal Law Division
JA320.ZIP	October 1991	Senior Officers' Legal Orientation Criminal Law Text
JA330.ZIP	October 1991	Nonjudicial Punishment—Programmed Instruction, TJAGSA Criminal Law Division
JA337.ZIP	October 1991	Crimes and Defenses Handbook (DOWNLOAD ON HARD DRIVE ONLY.)
YIR89.ZIP	January 1990	Contract Law Year in Review—1989

Complete download instructions will be reprinted in future editions of *The Army Lawyer*. Questions or suggestions concerning the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information about the LAAWS BBS, contact the system operator, SSG Mark Crumbley, at DSN 227-8655, or at the address listed above for the LAAWS Project Management Officer.

Guard and Reserve Affairs Item

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Quotas for JATT and JAOAC for Academic Year 1992

Quotas for Judge Advocate Triennial Training (JATT) and the Judge Advocate Officers Advanced Course (JAOAC) for academic year 1992 are available on ATRRS (Army Training Requirements and Resource System). To qualify for JATT,

you must be a United States Army Reserve judge advocate on a court-martial trial team, court-martial defense team, or a military judge team. To qualify for JAOAC, you must be a Reserve component judge advocate, currently enrolled in the advanced course, who has not completed any portion of the military justice subcourses (Phase II). Quotas are available *only* through ATRRS, the Army's automation system for the allocation of training spaces. If you are an Army Reservist in a troop unit or a National Guardsman, you should contact your training noncommissioned officer to request a quota. If you are an individual mobilization augmentee or an individual Ready Reservist, you should contact the Army Reserve Personnel Center, Judge Advocate General Personnel Management Office at 1-800-325-4916 or (314) 538-3762. When you request a quota, advise your point of contact that the school code for The Judge Advocate General's School (TJAGSA) in ATRRS is 181. The course number for JATT is 5F-F57 and the course number for JAOAC is 5F-F55. The class number for both JATT and JAOAC is 092.

All quotas for courses at TJAGSA now are available only through ATRRS. Do not call TJAGSA to obtain a quota for any course, including JATT and JAOAC, because TJAGSA cannot enter you into ATRRS.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by means of the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training, or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1992

1-5 June: 112th Senior Officers Legal Orientation (5F-F1).

8-10 June: 8th SJA Spouses' Course (5F-F60).

8-12 June: 22d Staff Judge Advocate Course (5F-F52).

15-26 June: JATT Team Training (5F-F57).

15-26 June: JAOAC (Phase II) (5F-F55).

6-10 July: 3d Legal Administrator's Course (7A-550A1).

8-10 July: 23d Methods of Instruction Course (5F-F70).

13-17 July: U.S. Army Claims Service Training Seminar.

13-17 July: 4th STARC JA Mobilization and Training Workshop.

15-17 July: Professional Recruiting Training Seminar.

20 July-25 September: 128th Basic Course (5-27-C20).

20-31 July: 128th Contract Attorneys Course (5F-F10).

3 August-14 May 93: 41st Graduate Course (5-27-C22).

3-7 August: 51st Law of War Workshop (5F-F42).

10-14 August: 16th Criminal Law New Developments Course (5F-F35).

17-21 August: 3d Senior Legal NCO Management Course (512-71D/E/40/50).

24-28 August: 113th Senior Officers Legal Orientation (5F-F1).

31 August-4 September: 13th Operational Law Seminar (5F-F47).

14-18 September: 9th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

August 1992

8-14: AAJE, Philosophical Ethics and Judicial Decisionmaking in Criminal and Civil Trial Courts, Ogunquit, ME.

8-14: AAJE, Judicial Reasoning, Boulder, CO.

11-14: ESI, Contract Pricing, Denver, CO.

16-21: AAJE, Clear and Persuasive Writing for Appellate Judges—Introductory Program, Boulder, CO.

16-21: AAJE, Clear and Persuasive Writing for Appellate Judges—Advanced Program, Boulder, CO.

18-19: ESI, Terminations, Seattle, WA.

20: ESI, Protests, Seattle, WA.

22-28: AAJE, Literature and Law, Seattle, WA.

22-28: AAJE, Advanced Constitutional Criminal Procedure, Seattle, WA.

24-28: ESI, Operating Practices in Contract Administration, San Diego, CA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1992 issue of The Army Lawyer.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
**Alabama	31 January annually
*Arizona	15 July annually
Arkansas	30 June annually
*California	36 hours over three years
Colorado	Any time within three-year period
Delaware	31 July biennially
*Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	June 30 annually
**Louisiana	31 January annually
Michigan	31 March annually
Minnesota	30 August every third year
**Mississippi	31 December annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Mexico	30 days after program
**North Carolina	28 February of succeeding year
North Dakota	31 July annually
*Ohio	Every two years by 31 January
**Oklahoma	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter every three years
**South Carolina	15 January annually
*Tennessee	1 March annually
Texas	Last day of birth month annually
Utah	31 December of second year of admission
Vermont	15 July every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June every other year
*Wisconsin	20 January every other year
Wyoming	30 January annually

For addresses and detailed information, see the January 1992 issue of *The Army Lawyer*.

*Military exempt

**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not within the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A239203 Government Contract Law Deskbook vol. 1/JA-505-1-91 (332 pgs).

AD A239204 Government Contract Law Deskbook, vol. 2/JA-505-2-91 (276 pgs).

AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).

AD B147390 Legal Assistance Guide: Real Property/ JA-261-90 (294 pgs).

AD B147096 Legal Assistance Guide: Office Directory/ JA-267-90 (178 pgs).

AD B147389 Legal Assistance Guide: Notarial/ JA-268-90 (134 pgs).

AD A228272 Legal Assistance: Preventive Law Series/ JA-276-90 (200 pgs).

AD A230618 Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-91 (73 pgs).

AD A244874 Legal Assistance Wills Guide/ JA-262-91 (474 pgs).

*AD A244032 Family Law Guide/JA 263-91 (711 pgs).

AD A241652 Office Administration Guide/ JA 271-91 (222 pgs).

AD B156056 Legal Assistance: Living Wills Guide/ JA-273-91 (171 pgs).

AD A241255 Model Tax Assistance Guide/ JA 275-91 (66 pgs).

*AD A246280 Consumer Law Guide/JA 265-92 (518 pgs).

*AD A245381 Tax Information Series/JA 269/92 (264 pgs).

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Office Manager's Handbook/ACIL-ST-290.

AD A240047 Defensive Federal Litigation/ JA-200(91) (838 pgs).

AD A236663 Reports of Survey and Line of Duty Determinations/JA 231-91 (91 pgs).

AD A239554 Government Information Practices/ JA-235(91) (324 pgs).

AD A237433 AR 15-6 Investigations: Programmed Instruction/JA-281-91R (50 pgs).

Labor Law

AD A239202 Law of Federal Employment/ JA-210-91 (484 pgs).

AD A236851 The Law of Federal Labor-Management Relations/JA-211-91 (487 pgs).

Developments, Doctrine & Literature

AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).

AD B135506 Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).

AD B137070 Criminal Law, Unauthorized Absences/JAGS-ADC-89-3 (87 pgs).

AD B140529 Criminal Law, Nonjudicial Punishment/JAGS-ADC-89-4 (43 pgs).

AD A236860 Senior Officers Legal Orientation/JA 320-91 (254 pgs).

AD B140543L Trial Counsel & Defense Counsel Handbook/JA 310-91 (448 pgs).

AD A233621 United States Attorney Prosecutors/JA-338-91 (331 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

a. Obtaining Manuals for Courts-Martial, DA Pams, Army Regulations, Field Manuals, and Training Circulars.

(1) The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from AR 25-30 is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(1) Active Army.

(a) Units organized under a PAC. A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam 25-33.)

(b) Units not organized under a PAC. Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(c) Staff sections of FOAs, MACOMs, installations, and combat divisions. These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.

(2) ARNG units that are company size to State adjutants general. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) USAR units that are company size and above and staff sections from division level and above. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) ROTC elements. To establish an account, ROTC regions will submit a DA

Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the Baltimore USAPDC at (301) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. This office may be reached at (301) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

b. Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 135-156	Personnel Management of General Officers	25 Jan 92
AR 690-900	Civilian Personnel, Interim Change 101	31 Dec 91
AR 735-17	Accounting for Library Materials	21 Nov 91
CIR 91-1	The Army Family Action Plan VIII and IX	26 Dec 91
JFTR	Joint Federal Travel Regulations, Change 62	1 Feb 92

3. TJAGSA Information Management Items.

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crankc(lee)" for PROFS.

b. Personnel desiring to reach someone at TJAGSA via autovon should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6- plus the three-digit extension you want to reach.

d. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

e. A recent addition to the Videotape Library at The Judge Advocate General's School is a tape entitled "Professional Responsibility for the Army Lawyer." This three-part tape discusses the ethical responsibilities of Army lawyers, civilian lawyers who work under the disciplinary authority of The Judge Advocate General, and civilian lawyers who appear before military tribunals. Among the topics covered are conflicts of interest, lawyer-client confidentiality, perjury, trial publicity, handling evidence or contraband, obligations to third parties, duties of subordinates and supervisors, and the procedures for reporting and investigating ethical complaints. Each part is approximately forty-five minutes long.

To obtain copies of this tape, please send blank tapes to The Judge Advocate General's School, U.S. Army, ATTN: JAGS-IM-V, Charlottesville, VA 22903-1781. Tapes are dubbed at *standard speed only*, so please send enough blank tapes to cover all three parts of this title.

5. The Army Law Library System.

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are autovon 274-7115, ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

b. The following materials have been declared excess and are available for redistribution. Please contact the libraries directly at the addresses provided below.

1. Mr. Frank Conway, Library Technician, San Francisco District, Corps of Engineers, 211 Main Street, San Francisco, CA 94105-1905; telephone: (415) 744-3275.

Federal Reporter 2d, vols. 1-499
Federal Supplement, vols. 1-399

2. Mrs. Margaret D. Albin, Property Acct. Officer, Nashville District, Corps of Engineers, P.O. Box 1070, Nashville, TN 37202-1070.

Code of Federal Regulations

Vol. 1 (1922) through vol. 25 (1946)
Vol. 26 (1947) through vol. 49 (1970)
Vol. 50 (1971) through vol. 68 (1989)

3 Index Digest Decisions of the Comptroller General of the United States:

July 1, 1921 to June 39, 1967
July 1, 1971 to Sept 30, 1976
Oct 1 1976 to Sept 30, 1981

United States Court of Claims Reports

Vol. 180 through vol. 183, dated 1967 & 1968

3. Staff Judge Advocate, U.S. Army South, Attn: CW2 Doheny, Fort Clayton, Panama; fax: 287-6345; telephone: 287-6412.

Words & Phrases (90 vol. set)

American Law Reports

2d ser. (100 vol. set)
2d Later Case Service (17 vol. set)
Word Index to Annotations (3 vol. set)
2d set (vols. 1-100 Digest)

Bender's Uniform Commercial Code Service Forms & Procedures

Corpus Juris Secundum (152 vol. set)

Cyclopedia of Trial Practice, 2d ed.

Bouvier's Law Dictionary, 3d ed.

Roberts' Dictionary of Industrial Relations

Federal Criminal Trial Practice, 3d ed.

Modern Federal Practice Digest (84 vol. set)

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Jan.-Aug. 1983
Mar. & Aug. 1984
Jan.-Dec. 1986

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*U.S. Government Printing Office: 1992 — 311-810/60002

PIN: 069816-000